Supreme Court, U. S.
FILED
DEC 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, et al.,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, et al.,

Respondents.

No. 78-119

STATE OF WASHINGTON, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, et al.,

Respondents.

PETITIONER STATE OF WASHINGTON'S BRIEF

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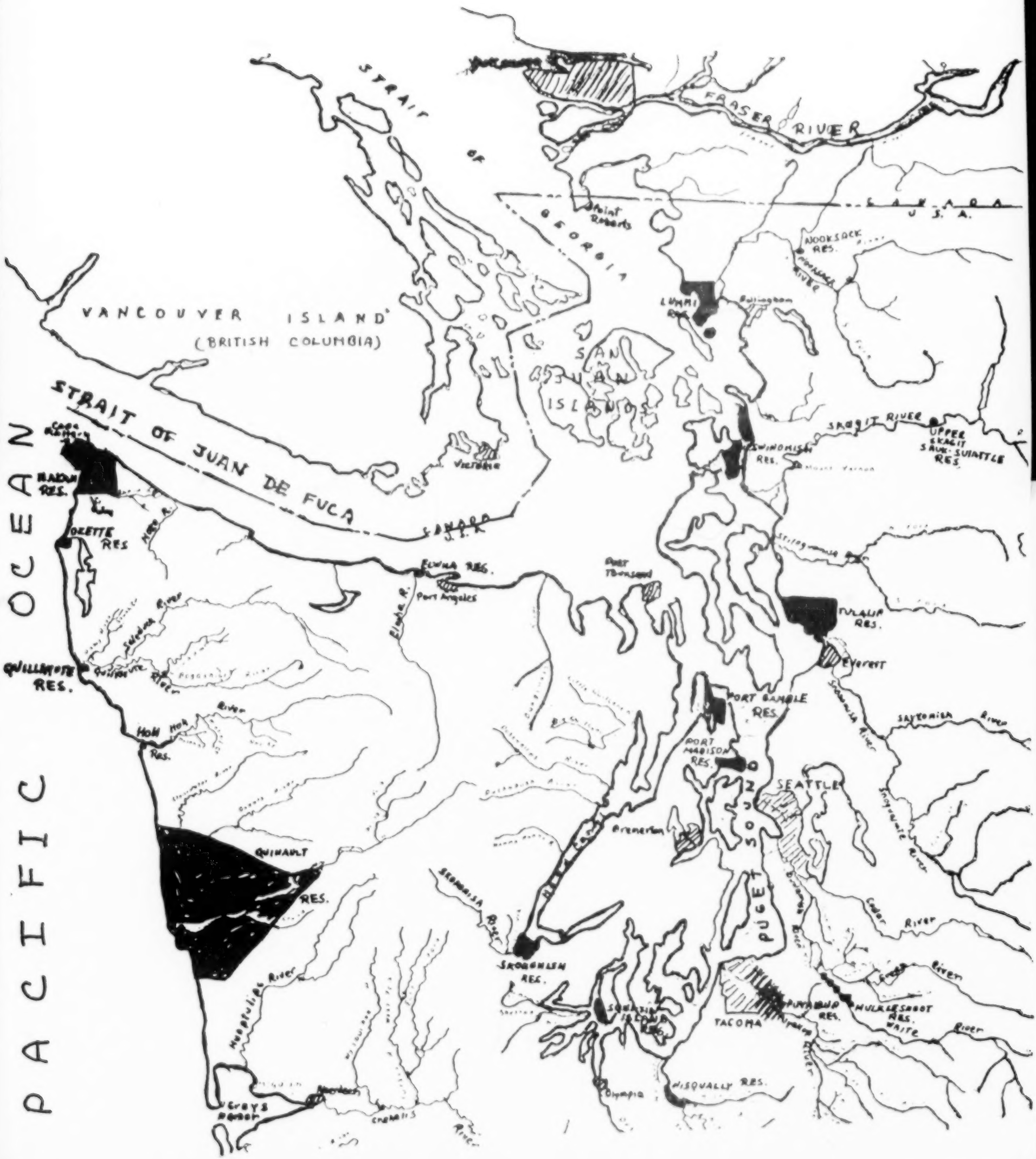
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WHITE RIVER
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Sequim
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Snoqualmie River
Cedar River
Green River
White River
Nisqually River
Chehalis River

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UNITED STATES

OCTOBER TERM, 1978

No. 77-983

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION and WASHINGTON KELPERS ASSOCIATION,

Respondents.

AND

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT OF FISHERIES, and ITS DIRECTOR,

Petitioners,

v.

PUGET SOUND GILLNETTERS ASSOCIATION, PHILIP SUTHERLAND, PURSE SEINE VESSEL OWNERS ASSOCIATION and FRANK MARINKOVICH,

Respondents.

No. 78-119

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES, and DONALD W. MOOS, Its Director,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondents,

MAKAH TRIBE, LOWER ELWHA BAND OF CLALLAM TRIBE, PORT GAMBLE BAND OF CLALLAM TRIBE, SUQUAMISH TRIBE, LUMMI TRIBE, NOOKSACK TRIBE, and SWINOMISH INDIAN TRIBAL COMMUNITY,

Intervenors-Respondents.

AND

STATE OF WASHINGTON, DEPARTMENT OF FISHERIES,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

No. 78-139

PUGET SOUND GILLNETTERS ASSOCIATION, et al.,
Petitioners,

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UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
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OPINION BELOW

On October 16, 1978, the Court granted certiorari on three petitions (Nos. 77-983, 78-119 and 78-139) and by order dated November 13, 1978, consolidated the three petitions for review.

Petition No. 77-983 is a request by the State of Washington for review of two decisions by the Washington State Supreme Court: *Puget Sound Gillnetters Association v. Moos* (hereinafter referred to as *"Gillnetters"*), 88 Wn.2d 677, 565 P.2d 1151 (1977) (App. D of the petition) and *Washington State Commercial Passenger Fishing Vessels Association v. Tollefson*, 89 Wn.2d 276, 571 P.2d 1373 (1977) (hereinafter referred to as *"Fishing Vessel 2"*) (App. B of the petition). This case is the decision upon reconsideration of 87 Wn.2d 417, 553 P.2d 113 (1977) (hereinafter referred to as *"Fishing Vessel 1"*) (App. F of the petition). In those decisions the Washington State Supreme Court found that United States treaties of 1854 and 1855 in Washington did not create a special Indian fishing right entitling treaty Indians to an allocation of the harvestable fishery resource. The court further concluded that the Washington Department of Fisheries is not authorized by state law to allocate fish for Indian fishermen.

The State of Washington in No. 78-119 and commercial fishing groups in No. 78-139 separately petitioned for review of *United States v. Washington*, 573 F.2d 1123 (9th Cir., April 24, 1978) (hereinafter referred to as *"Washington Fisheries case"*) (App. A-1, petition No. 78-119). In that decision the Ninth Circuit upheld a specific allocation of the fish resource and the direct control by the District Court of fishing activities in Western Washington as an exercise of continuing jurisdiction in *U.S. v. Washington*, 384 F.Supp. 312 (W.D. Wash. 1974) (Joint App. p. 63). 520 F.2d 676 (9th Cir. 1975) (Joint App. p. 39) (cert. den. 423 U.S. 1086 (1976)).

The second decision by the Ninth Circuit included in the same petitions is *U.S. v. Washington*, 573 F.2d 1118 (9th Cir., April 24, 1978) (hereinafter referred to as the

"International Fishery Case") (App. A-29 petition No. 78-119). The Ninth Circuit concluded that the District Court's determination that treaty Indians do not have to comply with certain regulations of the International Pacific Salmon Fisheries Commission and that they are entitled to 50% of the American harvest of those fish runs was moot.

JURISDICTION

The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

The constitutional provisions, treaties and statutes involved which are hereinafter enumerated are reproduced in App. A-128-167 petition No. 78-119.

Constitutional Provisions of the United States

(a) Article II, Section 2, *Powers of the President* A-128
(Section 2 Clause 2) (Presidential powers with the Advice and Consent of the Senate to Make Treaties)
(b) Article VI, *Debts, Supremacy Oath*, #2, Supremacy A-129
(c) Amendment V, *Due Process* A-129
(d) Amendment X, *Powers Reserved to States or People* A-130
(e) Amendment XIV, *Citizenship rights not to be Abridged* A-130

TREATIES

Six treaties were entered into by the United States with various Indian tribes and bands living in the State of Washington in 1854 and 1855. Those six treaties each contain a similar fishing provisions and only those provisions are set forth in App. 131-134 Pet. No. 78-119.

(a) Treaty of Medicine Creek, 10 Stat. 1132 . A-131
(b) Treaty of Point Elliott, 12 Stat. 927..... A-131
(c) Treaty of Point No Point, 12 Stat. 933 .. A-132
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(e) Treaty with the Quinaielts (Treaty of Olympia), 12 Stat. 971 ..... A-133
(f) Treaty with the Yakimas, 12 Stat. 951 ... A-133
Convention with Canada 1930 and 1956 Supplement. 50 Stat. 1355, 8 TIAS 3867, 8 UST 1057 . A-135-158

STATUTORY PROVISIONS

United States Code, Title 16:
Section 776 - 776f (Sockeye Salmon or Pink Salmon Fishing Act of 1947) A-159-61
Section 1801 - 1882 (Fishery Conservation and Management Act of 1976) A-162-67
Revised Code of Washington
RCW 75.40.060 Fraser River sockeye salmon fishery — Adoption, enforcement of convention authorized A-167

QUESTIONS PRESENTED

1. Do treaties executed by the United States with certain Indian tribes in 1854-55 in the Territory of Washington require an allocation of 50% of the harvestable fish to treaty Indian fishermen?
(78-119 # 1, 78-139 # 1)[1]

---

[1]If the question presented is a restatement consolidating questions presented in the three petitions for certiorari, those references are set forth within parentheses. When the reference is not within parentheses, the question is as phrased in the petition for certiorari.

2. Do the Indian treaties mandate an allocation of harvestable fish between treaty Indian and all other fishermen when both groups have an opportunity to participate in the fishery on a nondiscriminatory basis?
78-119 # 2 (77-983 # 1)

3. If the District Court has discretion to allocate a division of harvestable fish between treaty Indian and all other fishermen, did the court abuse its discretion in requiring that treaty Indian fishermen be entitled to all the fish they desire for subsistence and ceremonial uses, and all fish harvested on reservations, plus 50% of the remaining harvestable fish and including as part of the nontreaty 50% share of fish those fish harvested by treaty Indians outside of usual and accustomed fishing areas?
(78-119 # 3, 77-983 # 3, 78-139 # 1, # 5)

4. Does a special allocation of fish to treaty Indians who are citizens, and a reduction in the available fishery for other United States citizens, constitute a violation of the constitutional doctrines of equal protection and the prohibition against the granting of special privileges and immunities?
(78-119 # 4, 77-983 # 1, # 4)

5. Did the District Court, in assuming control of the management of the fishery resource in Washington state waters and ordering federal and state agencies to perform activities not authorized by statutory provisions exceed its authority?
(78-119 # 7, 77-983 # 2, 78-139 # 4)

6. If the Indian treaties mandate or authorize an allocation of harvestable fish to treaty Indians, does the United States/Canada Convention of 1937 supersede that requirement for the fish harvest which is subject to the jurisdiction of the International Pacific Salmon Fisheries Commission?
78-119 # 5

7. Do the Indian treaties, or can the District Court, grant Indians an immunity from enforcement of the

International Pacific Salmon Fisheries Commission regulations?
78-119 # 6

8. Are the Indian treaties' fishing provisions nonselfexecuting and nonjusticiable, thereby precluding judicial implementation?[2]
78-139 # 3

9. Is an individual who conducts business in the state, in such privity to that state, that a court may directly enjoin the citizen without his being a party to or participant in the cause of action in which the state is a party? Assuming privity, if an injunctive order is sought against an individual, is that individual entitled to notice of and participation in the injunctive hearing prior to its issuance?[2]
78-139 # 2

STATEMENT OF THE CASE

A. INTRODUCTION.

All of the actions which have been consolidated by this Court involve the interpretation and implementation of six treaties executed in 1854 and 1855 by the United States with Indians in the Washington Territory. The focal point of all of this litigation is the construction of the treaty provision;

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory. * * *"

(Treaty of Medicine Creek, Art. III, 10 Stat. 1132, A-131 Petition No. 78-119)[3]

---

[2]Questions 8 and 9 are presented by the petition of the commercial fishing organizations (#78-139) not by the State of Washington which in this brief will not present argument on these questions.

[3]The language of the other five treaties is substantially the same. See A-131-34, Petition No. 78-119.

The District Court for the Western District of Washington has construed this treaty provision to require an allocation of the fishery resource between treaty Indians and all other citizens and has further, in implementing that decision, restricted and substantially displaced the state of Washington as the manager of the fishery resource. (*U.S. v. Washington*, 384 F. Supp. 312, *supra*, (Joint App., p. 63), and subsequent orders, (Joint App. pp. 202 et seq. 423 et seq.).

The principal impact of this decision has been upon salmon and steelhead trout, both of which are anadromous[4] fish which constitute a major natural resource of the Pacific coastal states and British Columbia.

There is an annual harvest of approximately 8,000,000 fish. The commercial fish harvest by Indians and non-Indians represents a major industry in the State of Washington. For many of the small towns and communities of Western Washington the fishery industry on salmon is the economic mainstay. The economic viability of these communities is dependent upon the success or failure of the season's fishing harvest. Salmon and steelhead also provide a major recreational activity for citizens of Washington and many other states.

The fishery resource now is largely managed by the District Court to achieve its mandated division of the resource between certain Indian fishermen and all other citizens, including both Indians and non-Indians.[5] The court-ordered division of fish operates in this fashion:

[4]Anadromous fish spawn in fresh water streams or hatcheries. They migrate to salt water where they mature, returning to fresh water to spawn. Pacific salmon die after spawning. Steelhead trout (like Atlantic salmon) may live to spawn again.

The District Court has also applied its division of the resource to some fish which are not anadromous, such as herring.

[5]Many Indian citizens in Washington do not share the special fishing rights. Some tribes have no treaties. Although one group of intervenor tribes is not recognized by the United States government, the District Court has permitted its fishermen to fish without licenses if they establish to the court's satisfaction their "blood quantum." They are also permitted to enjoy the same rights as the recognized treaty tribes when invited to fish by one of those tribes.

First, the treaty tribes designate a reservation catch. Second, the tribes specify the number of salmon and steelhead which they will take for ceremonial, and subsistence purposes. Third, and finally, after the reservation, ceremonial, and subsistence harvests by Indians are subtracted from the total fish available for harvest, the remainder is then divided: half to the treaty Indian fishermen and the other half to all other citizens, both Indian and non-Indian. In addition, under the court's allocation formula, any harvest made by treaty Indian fishermen outside of their usual and accustomed fishing grounds are computed as part of the all-citizen fishery, not as part of the treaty Indian fishery.[6] We will hereinafter refer to this formula as "50% plus."

The District Court's decision precipitated an economic upheaval for commercial fishermen in the State of Washington. According to a report by the United States National Marine Fisheries Service, March 3, 1975, which summarized the results of its first year:

> The sharply reduced landings experienced by Puget Sound net fisheries during 1974 were due in large part to court decisions that apparently transferred about $2,000,000 in landings from the nontreaty commercial gear to treaty Indian gear. (Page 1)

This report further indicated a drop in net earnings from 1973 (pre-judgment) to 1974 (post-judgment) for nontreaty gillnetters from $9,379 to $1,527; for purse seiners in the same period from $30,568 to $13,026; for reefnetters from $9,287 to an average loss of $68. The report also observed, with reference to the nontreaty fishermen, that:

> * * * because of their age, years spent in

[6]In addition to all of these factors which increase the treaty Indian allocation over the 50% level, the court also invokes what it designates as an "equitable adjustment." By this "adjustment," the court increases the fish allocated to the treaty Indians to reflect fish caught by Washington citizens in areas beyond the state's jurisdiction, such as the ocean fishery regulated by the United States (16 USC 1801, et seq. A-162-167 Pet. No. 78-119), that might return to Washington waters if not harvested in those areas.

> commercial fishing and attachment to this industry, [they] are likely to be somewhat immobile in moving to other types of employment. * * *

The commercial fishermen impacted by the District Court order have generally been involved in the fishery for many years. The National Marine Fisheries Service report reflects the average number of years spent in commercial fishing by individual gillnetters to be 16; purse seiners, 28; and reefnetters, 18.2. Most of these fishermen are individual entrepreneurs, not large corporate employers. These fishermen, who have been impacted by the creation of an allocation system 120 years after the treaties, have individually and through their organizations filed a number of actions in various courts, including those which are now here on certiorari from the state supreme court. Some of these commercial fishermen, who historically have been law-abiding citizens of the state, have engaged in fisheries in violation of federal court orders and regulations adopted by the state. It should be noted that such violations (by both treaty Indian fishermen and by nontreaty fishermen) have continued to occur as recently as October and November, 1978.

B. HISTORY OF COURT PROCEEDINGS.

In 1970, the United States, on behalf of seven Indian tribes, sued the state of Washington in the United States District Court for the Western District of Washington. The prayer was for declaratory and injunctive relief predicated upon five treaties[7] executed by the United States and Indians in 1854 and 1855. Subsequently, in 1971, seven additional plaintiff tribes and two defendant state agencies (Fisheries and Game) were permitted to intervene. Intervention by sport and commercial fishing organizations were denied.[8]

---

[7]When the Yakima tribe was permitted to intervene, a sixth treaty was interjected.

[8]One commercial group, the Washington Reef Net Owners Association, was permitted to intervene during a period when the case was assigned to another District Court Judge.

On February 12, 1974, the District Court rendered its Final Decision, Findings of Fact, Conclusions of Law, Judgment and Decree. On March 22, 1974, the court entered orders amending the Final Decision and implementing an Interim Plan. (Joint App. 202 et seq., 437)

The District Court retained continuing jurisdiction to implement its decision. The Ninth Circuit Court essentially affirmed. *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), cert. den. 423 U.S. 1086 (1976). (Joint App. 39)

The District Court appointed a Master, a "fishery expert" and a "fisheries advisory board" to apply the decision.

Nearly 200 subsequent orders have been entered and there have been over 5,000 docket entries. More than 20 subsequent appeals to the Ninth Circuit have been taken by the state, nontreaty fishermen and tribes. Actions in state courts, in which the state and its officers have been defendants, have proliferated (on several occasions, despite injunctions against those courts by the District Court) and have resulted in a number of Washington Supreme Court decisions.

1. The Washington State Court Actions: No. 77-983

After the District Court decree in 1974 that Indians were entitled to "50%-plus" of the fish harvest, the Washington Department of Fisheries adopted regulations designed to increase the fish available for harvest by the tribes at their usual and accustomed grounds and stations. Those regulations restricted the catch in the ocean by sport and commercial fishermen. The reduction was to be accomplished by lowering the maximum number of fish sport fishermen were allowed to catch each day and closing some ocean areas to commercial troll fishing. Those regulations were invalidated by a Washington state superior court in a consolidated action brought by the Washington State Commercial Passenger Fishing Vessel Association, an organization of charter boat operators and service industries supporting ocean sports fishermen, such

as motel owners, and by the Washington Kelpers Association, an organization of ocean commercial troll fishermen.

An appeal by the Washington Department of Fisheries to the state supreme court was decided after the fishing season was over. The court ordered it dismissed as moot. *Fishir Vessel* 1, *supra*. The department's petition for reconsideration was granted by the court, but in *Fishing Vessel* 2, *supra*, the decision of the trial court invalidating the state regulations was affirmed.

The other state court decision included in Petition No. 77-983 challenging the efforts of the state to implement the 50%-plus allocation was filed directly in the Washington State Supreme Court by an individual and an organization of commercial fishermen who fish in the interior salt water areas in Washington. The court's decision in that case is *Gillnetters, supra*. The court held that state Department of Fisheries regulations restricting or prohibiting non-treaty fishing in order to allocate fish to treaty fishermen were unconstitutional violations of the equal protection and privileges and immunities clause of the Fourteenth Amendment and that such regulations were beyond the statutory authority of the department.

2. **Washington Fishery Case.**

The determinations by the Washington state courts that state regulations to effectuate the 50%-plus allocation were invalid rendered it impossible to enforce those regulations in state courts.

In August of 1977 the District Court entered a series of orders largely preempting state authority over fisheries management, taking over all aspects of the treaty Indian allocation and setting out an allocation in detail by specific percentages and numbers of fish rather than by the "opportunity" to harvest fish which was the language of its original 1974 decision. Pursuant to these orders, the state Department of Fisheries was to manage only the non-treaty allocation of the fish. State courts promptly enjoined the department's attempted compliance, concluding that the department's regulations constituted an impermissible allocation.

On August 31, 1977, the District Court entered eight new orders creating an entire system for the management of the Washington fisheries and extending the system to an area of Washington not originally included in the case (Grays Harbor). A similar system has been adopted for 1978 and subsequent years. Court preemption of the management of the fishery is now complete.

Under the system, treaty Indian allocations are set forth by percentages and numbers of fish by species and area. Nontreaty commercial fishermen (except those in the ocean) may fish only with the consent of the court communicated by a recorded telephone message controlled by the National Marine Fisheries Service. In some interior waters no nontreaty commercial harvest was allowed in 1978; in others, treaty shares by species and region varied from 52% to over 90%. Catches by Washington ocean commercial troll fisheries and all sport fisheries are counted in the nontreaty allocation but these fisheries are exempted from specific court management and thus do not share directly in the burden imposed by the allocation.

These orders are, of course, based on the district court's 1974 interpretation of the treaties.

This court decided *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (hereinafter referred to as *Puyallup III*) construing the same treaties in June of 1977. In light of that decision, the state moved for reconsideration of the District Court's basic 1974 decision, prior to the August, 1977, District Court orders and in light of the passage of the Fishery Conservation and Management Act of 1976 (16 USC § 1801, et seq. A162-167, Pet. No. 78-119) by which regulation of the ocean fishery occurring more than three miles off-shore was preempted by the federal government. The District Court has never acted on that motion.

3. **International Fishery Case.**

There was an apparent recognition by the District Court and the Ninth Circuit Court of Appeals in the first

United States v. Washington, supra, (Joint App. 39) decision that treaty Indians were subject to regulations of the International Pacific Salmon Fisheries Commission[9] (hereinafter referred to as "IPSFC" or "Commission") on the same basis as other citizens. In the first year following the 1974 decision, treaty Indians complied with IPSFC regulations. Enforcement was by the historical pattern of adoption of those regulations by the Washington Department of Fisheries as state regulations and enforcement in state courts in case of violation.[10]

In February, 1975, when the proposed IPSFC regulations were approved by the United States and Canada, those regulations were transmitted by the United States State Department to the Washington Department of Fisheries for adoption as state regulations. The state did so. (Ex. USA-77)

In June of 1975, several tribes, supported by the United States government, moved for a determination that their members were entitled to 50% of the American share of the IPSFC Fraser River stocks. An injunction was granted directing that the State Fisheries Department allow no non-Indians to fish in IPSFC waters until special fisheries for treaty Indians were established for those waters.

At the request of the state, the District Court delayed the effect of its order until July 10, 1975 (Record in 9CCA No. 75-2835 p. 69). This provided Fisheries with the opportunity, which the department exercised, to ask the IPSFC to allow a special Indian fishery. During that period the IPSFC met and declined to change its regulations so as to provide for any special Indian fishery. (Ex. Jx-7)

On July 11, 1975, after an evidentiary hearing, the District Court again delayed the preliminary injunction to

[9]This international commission was created pursuant to a convention with Canada, 50 Stat. 1355, to manage the Canadian Fraser River fish runs which travel through the waters of British Columbia and the state of Washington.

[10]Revised Code of Washington 75.40.060.

July 16, 1975. The Court directed that the state Fisheries director "* * * promptly take action, whenever seems appropriate in the occasion, to press the matter before the Commission." (Tr. July 11, 1975, p. 144)

Then, on July 16, 1975, the District Court ordered the state Fisheries Department to establish by regulation two special treaty Indian fisheries in IPSFC waters. (A-105, Pet. No. 78-119)

The same day, July 16, the District Court stayed its order (1) "pending conclusions of discussions between representatives of the United States and Canada now scheduled for Friday, July 18, 1975; and (2) determination by the court of any promptly proposed modifications or amendments resulting from said discussions." (Tr. July 16, 1975, p. 99).

At the meeting of July 18, 1975 the United States and Canada did not agree to any revision of the IPSFC regulations so as to allow the special Indian fisheries ordered by the District Court (Ex. USA 94).

On July 21, 1975, Fisheries promulgated the regulations ordered by the District Court, and the following day appealed that order to the Ninth Circuit. The District Court granted a stay order pending appeal. (Tr. July 22, 1975, p. 120).

A commercial fishing organization then sued the Department of Fisheries in state court on July 23, 1975. The state court ruled that the special IPSFC regulations which had been adopted by Fisheries to comply with the order of the District Court were beyond the department's statutory authority. The court ordered those regulations suspended. (Ex. F-81).

The following week, July 30, 1975, the District Court modified its injunction, dissolved the stay, and made its permanent injunction respecting the IPSFC fishery immediately effective. (Docket No. 1211).

In response, the Department of Fisheries on the next day adopted the regulations required by the District Court injunction.

On the following day, August 1, 1975, the state superior court ordered the suspension of the new regulations promulgated by Fisheries to comply with the most recent District Court order. (Ex. F-86).

Fisheries complied with that order and repealed the regulation. (Ex. F-84).

The District Court then made effective the order enjoining Fisheries from allowing any IPSFC fishing by nontreaty fishermen until Fisheries had in effect special treaty Indian regulations for that fishery. (Record, CCA No. 75-2835 pp. 109-110).

Fisheries then suspended all regulations implementing the IPSFC regulations, thus withdrawing from permitting, prohibiting or regulating that fishery. (Ex. F-87).

On August 6, 1975, the United States attorney made an oral motion in District Court for a stay of the proceedings in the state court. No notice was given to the state court but counsel from the Attorney General's Office representing Fisheries was present. (Tr. August 6, 1975, p. 14) The District Court granted the request and issued an order ordering the stay of state court proceedings. The court then directed Fisheries to repromulgate the regulations enjoined by the state court and denied Fisheries' motion to stay the District Court's injunction. (Docket No. 1240).

The District Court order of August 6 made additional "Modifications and Additions" to the Findings and Conclusions re Fraser River Sockeye and Pink Salmon Harvest. The conclusions included the following:

> 63. The Stevens treaties between the United States and the various Indian tribes, as interpreted by the Court and the Ninth Circuit Court of Appeals, preempted State control of fishing within Washington territorial waters in Puget Sound, including Fraser River sockeye and pink salmon, and made it the supreme law of the land that the Indians must be allowed the opportunity to take up to fifty per cent of the fish that may be legally harvested in Washington territorial waters. (A-123 Pet. No. 78-119).

This conclusion has formed the basis for the court's (and the United State's) subsequent actions in connection with the IPSFC: Indians are now entitled to 50% of the United States' share.[11]

The department sought a stay from the Ninth Circuit on August 18, 1975, which was denied on August 20, 1975. (CCA No. 75-2835). The state court then found the regulations adopted at the direction of the District Court to be invalid on September 19, 1975. The State Supreme Court refused to grant a stay on September 23, 1975. The state trial court was affirmed in *Purse Seine Vessel Owners Assoc. v. Moos*, 88 Wn.2d 799, 567 P.2d 205 (1977).

On October 2, 1975, a second notice of appeal to the Ninth Circuit Court of Appeals was filed by Fisheries specifically appealing the modification of the IPSFC decrees. The two appeals were consolidated by the Ninth Circuit Court of Appeals in January, 1976. The appeal was argued in February, 1978, and the decision in April of 1978 held that the appeal was moot. (A-29, Pet. No. 78-119).

C. CHARACTERISTICS OF SALMON AND STEELHEAD FISH.

Salmon and steelhead are anadromous fish; that is, they spend successive portions of their life cycles in fresh, then salt, and finally fresh water. These fish hatch from eggs in fresh water streams or hatcheries. At this stage of their development, they are known as fry. Depending upon the species, the juvenile fish spend varying periods of time (from less than a month to as long as two years),[12] in fresh water before migrating to the ocean. Again, depending

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[11]The actions by the United States for the 1978 IPSFC fishery appear to be based upon a 20% Indian share of the American Fishery. See, *Purse Seine Vessel Owners Association v. United States*, (9th Cir., October 26, 1978, No. 77-2968).

[12]For pink and chum normally only a month or less; for steelhead and sockeye up to two years; for coho and spring run chinook approximately 14 months; and for fall run chinook three to six months, with variations by all.

upon the species, the fish will spend varying periods of time (from less than one to more than four years) in the ocean while they mature. The fish then return to the same fresh water stream or lake in which they hatched in order to spawn. It is during the "run" to the spawning grounds that the major portion of the commercial net fishery harvest occurs in Washington waters.

There are five major species of salmon: chinook, chum, coho, sockeye and pink.[13] Steelhead[14] is a species of trout. Within the portion of western Washington encompassed by the District Court's orders, one or more of these species is produced in each of fifteen major river systems and their tributaries, and also in 239 small independent streams emptying into the marine waters of Puget Sound, the Strait of Juan de Fuca, and the Pacific Ocean north of Grays Harbor, Washington. There are also fish from Idaho, Oregon, California and British Columbia which feed in and migrate through Washington waters. Many are also produced "artificially" in hatcheries or man-made spawning channels.[15]

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[13]The species have been listed in terms of average size at maturity. While the weights vary considerably, the averages are: chinook - 20 pounds, chum - 10 pounds, coho - 7-8 pounds, sockeye - 6 pounds, and pink - 4-5 pounds.

[14]The average mature steelhead is 7-8 pounds with substantial variations anong individual fish.

[15]The Department of Game has developed a substantial steelhead planting program supporting sixteen state hatcheries and nine major rearing ponds. (Ex. G-14, p. 7) Hatchery steelhead smolts are planted in approximately 60 rivers in Washington; and in 1973, these hatcheries produced 3,000,000 winter steelhead smolts and 1,500,000 to 2,000,000 summer steelhead smolts. (FF 240, Joint App. 188) These programs are relatively expensive enterprises, for only an average of 5% of the smolts planted will ever return as adults to the site of their planting for spawning.

The Department of Fisheries conducts rearing programs at 32 major and 26 satellite fish cultural stations. These programs include a combination of egg-taking, hatching, feeding in standard facilities, lakes and pens, "egg box" programs, and natural spawning in prepared channels.

A "run" of fish (for practical management purposes) normally refers to groups of fish of the same species from the same geographic area or streams of origin which are together enroute to their spawning grounds. (Ex. JX-2, p. xx).

In marine waters (i.e., salt water areas), runs of the same species to the various rivers and streams are usually mixed. As the runs proceed easterly through the Strait of Juan de Fuca (or southerly through Georgia Strait) and into Puget Sound, each run breaks off and enters its natal stream.[16] In addition to the mixing of different runs of the same species in marine waters, runs of different species (e.g., Puyallup River fall chinook run and coho runs, and Nisqually River chum run and steelhead run) are often mixed in both marine and fresh waters. (Ex. JX-2a, Tables 2-17). The mixing of runs of the same and different species complicates conservation regulation of the fishery harvest because fishing activities affecting a particular run

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Salmon expected to be liberated in waters of the state by the Department from July, 1978, through June 1979, are as follows:

Species	Numbers of Fish
Chinook	98,900,000
Chum	85,100,000
Coho	63,900,000
Sockeye	13,000,000
TOTAL	260,900,000

The state is engaged in experimental programs to determine the feasibility of hatchery production of pink salmon.

[16]For example, chinook salmon destined for the Nooksack River (in northern Puget Sound), the Puyallup and Nisqually Rivers (in southern Puget Sound), and numerous other streams and hatcheries all enter the Strait of Juan de Fuca together. As the chinook runs proceed, the run to the Nooksack River and Samish hatchery branches off and the runs to the southern Puget Sound rivers remain mixed. As the runs proceed further south, the Puyallup River (including the Puyallup hatchery), Minter Creek hatchery, Nisqually River and Deschutes hatchery runs successively split off. (This listing is for illustration purposes only since the successive split offs will occur for virtually every watershed.)

frequently have an incidental effect on other runs present in the fishing area.[17]

These fish migrate and feed over very broad and overlapping areas. Some remain as "residents" within a few miles of their natal streams while others migrate as far as the Gulf of Alaska. In any given area of the coastal waters and Puget Sound, not only are steelhead and salmon of varying species likely to be found together, but also fish at varying stages of maturity are found within each species.

Sockeye, chum and steelhead tend to feed in Washington waters ony as juveniles, migrating northward sometimes as far as the Gulf of Alaska and beyond the continental shelf before commencing their spawning migrations. Pinks have a similar life cycle but often spend a month or more as feeding adults in near-shore Washington waters before completing their spawning journey.

Chinook and coho usually feed on the continental shelf where they are available to ocean sport and troll fisheries for a major portion of their post-juvenile lives. Both species may remain close to their native streams or may migrate a thousand or more miles along the coast while feeding. Chinook have a consistently northward migration, with some members of most stocks reaching southeastern Alaska. Washington coho are found from nothern California to northern British Columbia.

Stocks of each species in Washington have distinct and overlapping timings of spawning migration and ages of maturity. Pinks mature exclusively at two years and enter streams in late summer and early fall.[18] Coho females mature at three years as do most males, but many males ("jacks") mature at two years of age. Coho enter the streams from late summer through winter. Chinook mature as two, three, four, five and sometimes six-year old

[17]Net mesh size regulations are used when it is desired to allow one species to escape while another is harvested. However, this is only effective when the species of salmon present are of a sufficiently different size. (Ex. JX-2a, p. 55).

fish, with major spawning migrations occurring from early spring to late fall. Chum salmon mature at from 3 through 5 years of age and enter spawning streams from September through March. Sockeye mature at ages 3 through 6 but are normally "4's". In isolated instances they return to streams in the spring. Usually Sockeye runs take place from June through September.

Male salmon of all species except chum and pink tend to mature at earlier ages than females. Steelhead usually spawn at ages 4 through 7 but differ from Pacific salmon in that some survive after spawning while all Pacific salmon die after spawning. Steelhead migrations to the streams occur primarily from November through April, but in some streams there is a summer run.

Among all these species and stocks there are great differences in the proportion of the runs required for spawning. In some situations runs can barely maintain themselves so that there is no harvestable supply.

The survival of wild fish from egg deposit to stream out-migration is usually between 5 and 30%. Hatchery produced fish have substantially lower mortality with 70-95% surviving from egg to out-migration. The higher rate of survival in a hatchery environment allows a harvest of a higher percentage of a hatchery fish run than a natural fish run because fewer spawning fish are needed to perpetuate the run. For example, one study of Coho indicated a survival of hatchery fish seven times that of the wild stocks in the same area. In light of the higher survival rate, the harvestable portion of a healthy hatchery stock can be 1½ to 15 times that of a healthy wild stock.

D. MANAGEMENT OF THE FISHERY RESOURCE.

To provide for the protection and optimum utilization of anadromous fish, which are a public resource, it is necessary to exercise comprehensive management control.

[18]Pinks occur only in odd-numbered years in Washington waters and are the only salmonide species with this characteristic.

As the prior discussion of the salmon resource clearly indicates, a management program to preserve salmon stocks, to obtain optimum yields, and to provide for an orderly fishery is an exceedingly complex enterprise. In contrast the management of the steelhead resource has been relatively simple.

There are substantially fewer steelhead than salmon in Washington waters. The respective harvests in 1971 were 264,599 steelhead to 7,777,093 salmon. Steelhead, unlike mature salmon, feed in fresh water when returning to spawn. That characteristic makes steelhead more susceptible to being caught by a hook and line fishery. Nevertheless, steelhead are difficult to hook and even more difficult to land, and thus fishing for them is considered a challenging sport. The recreational importance of the steelhead fishery is reflected by the fact that sports fishermen are willing to spend an average of nearly 23 hours per fish caught in the Puyallup River.

To protect steelhead and to maximize the recreational value of that resource, Washington in 1925 declared steelhead to be a game fish in fresh waters (FF 168, Joint App. 161). The effect of the state's designation was to bring the steelhead under the protection of game statutes which prohibit the net fishing or commercialization of game fish. RCW 77.16.040. In 1933 steelhead was made a game fish for all purposes, including both fresh and salt water fishing. (FF 168, Joint App. 161) Since that time off-reservation fishing for steelhead has been confined to a hook and line sport fishery, with the exception of Indian net fisheries (FF 219, Joint App. 180) authorized pursuant to this Court's decision in *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973), (hereinafter referred to as *Puyallup* II.

The steelhead fishery occurs almost exclusively in fresh water. (Ex. JX-2a, p. 49). The relative inefficiency of a hook and line sport fishery, that is, the substantial time expended per fish caught, is such that it does not require the day-to-day management control necessary for a commercial net fishery in order to allow sufficient

escapement for spawning. To some extent a sports fishery is "self-controlling." When there is a small fish run the catch by sport fishermen declines and as the catch declines so too does the interest of some fishermen, thus reducing the number of people trying to catch fish.

For conservation purposes, the state limits the sport fishermen to a total annual catch of steelhead of thirty fish and a maximum of two per day. However, the average catch per sport fishermen is only two steelhead per year. (FF 241, Joint App. 189). Time and area closures are also common in steelhead management. Thus, the management system for steelhead is relatively simple if there is no commercial harvest.

As noted earlier, in on-reservation and off-reservation waters, pursuant to *Puyallup II, supra*, Indians engage in a net fishery for steelhead at usual and accustomed grounds and stations generally at the mouths and lower reaches of rivers. This fishery is easier to manage than a marine salmon fishery because the steelhead run is usually separated from other species at the time of the fishery although there are overlaps with later run chum in some rivers. While fish managers have fewer variables to contend with, an intensive Indian net fishery can and has resulted in a substantial disparity[19] in the relative Indian and sport harvests of steelhead due to the difficulty in regulating such net fisheries.

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[19]An example of the disparity is reflected by the steelhead fisheries on the Green, Skagit and Nisqually Rivers reflecting the respective harvests by treaty Indians and vis-a-vis all other citizens:

	74/75	75/76	76/77	77/78
Green:				
Indian	7419	6190	3258	4340
Non-Indian	4291	1591	2400	6690
Skagit:				
Indian	15973	6332	2416	4250
Non-Indian	5743	1647	1241	3672
Nisqually:				
Indian	4944	3695	2691	2331
Non-Indian	843	238	860	1157

Under Washington law, the Department of Fisheries has the responsibility and authority to manage and regulate salmon fishing (FF 167, Joint App. 161). In performing that task the department must take into consideration both the salmon resource and the objectives and needs of the society seeking to utilize it (FF 169, Joint App. 162). The complexity of that task and the need for professional expertise flows from the very nature of the salmon resource.

As previously indicated, the five species of salmon originate and migrate from streams and tributaries throughout western Washington. During their migratory pattern ranging from northern California to the Gulf of Alaska, they encounter salmon and other fish from other areas. Each species and run of that species has its own particular set of characteristics and varying percentages of return are needed for the hatchery and natural spawning of future generations.

Conservation management of this resource is complicated by the fact that in any given area in the ocean or interior waters of the state many fish from different species and from different rivers and streams of origin are present at the same time. Thus, the managing agency must carefully draft regulations to permit an appropriate harvest of those which are in surplus without jeopardizing the other species or stocks present for which it is not appropriate to permit a harvest. Management of the harvest requires daily monitoring during the fishing season so that on the basis of the changing information so obtained, restrictions can be imposed or modified so as to protect the fish needed for replenishing the run and at the same time to maximize the effective harvest of the fishery. That harvest of the salmon occurs by both sport and commercial fishing, with Indians participating in both. In managing the fishery for both groups, the object is an optimum sustained yield. (FF 169, Joint App. 162).

We have earlier made reference to the sport fishery for steelhead. There are also sport fisheries for salmon. In sport fisheries each fisherman uses a rod with one fishing

line with the hope that a fish will strike the bait or lure and be caught. These fisheries occur primarily on the ocean and inside marine waters, although small, but important, salmon sport fisheries take place on about one hundred rivers, lakes and creeks. Marine sport fisheries in Puget Sound primarily harvest immature feeding salmon and do not significantly impact most mature brood stocks, which are fish migrating to spawning grounds. (Ex. JX-2a, p. 49). As previously noted, with the exception of steelhead, mature fish generally cease feeding during the course of spawning migration (FF 173, Joint App. 163) The majority of the salmon caught by hook and line in fresh water are small mature males or immature "jacks." (Ex. JX-2a, p. 125)

Generally, the objectives of Indian fishermen are closer to those of the commercial net fishermen than to those of ocean trollers or sport fishermen. Until recently, however, few tribes were active in marine fisheries. Historically much of the Indian fishing took place at the mouths and the upstream courses of coastal and Puget Sound rivers. (FF 176, Joint App. 164). When fishing occurs in the confined areas of the rivers where the fish are heavily concentrated, careful day-to-day regulation to protect the run or harvest is an absolute necessity. (FF 176, Joint App. 164). If spawning escapements are to be achieved particularly stringent controls of the harvest near or in the natal stream are vital. In addition, salmon deteriorate in condition as they approach spawning, and major Puget Sound harvests in fresh water commonly diminish potential economic values that might be derived from salmon resources.

Commercial fishing involves a variety of techniques which vary both in efficiency and from area to area. In the ocean fishery of the Pacific Northwest, anadromous fish are taken by "trolling," a technique similar to the hook and line method of the sport angler, but multiple lines and hooks are utilized. Net fishing in the ocean has been prohibited by agreement between the United States and Canada. On the Washington coast the ocean salmon catch

consists primarily of chinook and coho. A significant number of pinks are also caught but only small percentages of the other salmon species, and virtually no steelhead.

Commercial fishing in inland marine waters of the state of Washington is by means of various kinds of net gear: Gillnets, purse seines, and reefnets. Commercial harvests are targeted on mature fish with net fisheries mainly occurring during the brief periods when fish are migrating to their spawning grounds. (FF 172, Joint App. 163). Net fishing seasons permit the efficient taking of mature fish but require careful day-to-day monitoring and constant emergency adjustments in regulations.

A drift gillnet is suspended in subsurface waters, supported by floats at the surface and held vertical by a weighted line at the bottom called the "lead line." The mesh of the gillnets come in various sizes, as some sizes of nets will selectively capture certain types of salmon surplus to spawning objectives which are of a larger or smaller size than other fish which should be protected. Fish attempting to swim through the mesh are usually caught behind their gills. (Ex. JX-2a, p. 117).

Purse seine nets have smaller, heavier mesh than gillnets. They capture fish by enclosing them; that is, the net is pulled into a circle and a long rope threaded on rings suspended on the bottom rim of the net is pulled tight. The net is then pulled into the boat, steadily diminishing the circle in which the fish are confined until the fish may be lifted into the boat (Ex. JX-2a, p. 120).

A reefnet utilizes nets to make a funnel, channeling the fish into a net which is then raised thereby catching the fish (Ex. JX-2a, p. 122).

Treaty Indians employ all of these techniques, and in addition, set fish traps and set nets, the use of which (i.e., fixed gear) is otherwise prohibited to all other citizens by state law.

The fisheries are managed to provide for a harvest of the surplus fish from each run after natural spawning and artificial production requirements are assured.

Great numbers of salmon which originate in the area covered by this case are harvested in ocean waters beyond the state's jurisdiction. (FF 185 Joint App. 167) Canadian fishermen harvest 65% of the Puget Sound origin Chinook and over 50% of Puget Sound origin Coho salmon. Seventy-five percent of the ocean catch of Olympic Peninsula origin Chinook and 50% of like origin Coho salmon take place off the coast of British Columbia and southeastern Alaska. Ninety percent of the ocean catch of Puget Sound origin Chinook salmon occurs off the coast of British Columbia. In the 1960's, the average harvest occurring in ocean waters outside the territorial jurisdiction of the state, from stocks originating in rivers on which there are Indian fisheries in the case area, except for the Quinault and Queets rivers, has been: Chinook, 58.9%; Coho, 55.3%; Pink, 29.4%; Chum, 2.6%. (FF 186 Joint App. 168) Other than control over fish landings, there are no fish management regulations or practices which the state of Washington can employ effectively to control fishing beyond its territorial waters. Nothing prevents United States fishermen from landing their catches in neighboring states.

E. IPSFC WATERS (Fraser River Fish Runs).

The most valuable commercial fishery in the state occurs on the Pink and Sockeye salmon runs headed for British Columbia's Fraser River (JX-2a, pp. 13-14, 135). This fishery takes place in the Strait of Juan de Fuca and in the waters surrounding the San Juan Islands, and is regulated by the International Pacific Salmon Fisheries Commission (hereinafter IPSFC or "Commission") pursuant to a 1937 convention between the United States and Canada. 50 Stat. 1355. The Commission is international in composition. Three commissioners are appointed by the President of the United States and three are appointed by the government of Canada.

By this convention the United States has obligated itself to enforce IPSFC Commission regulations. Pursuant to authority conferred by Congress, Washington's Depart-

ment of Fisheries adopts and promulgates the Commission's regulations, and until recently, enforced those regulations against all Indian and non-Indian citizens. While the IPSFC Commission's jurisdiction is specifically over Fraser River pink[20] and sockeye salmon, its regulations do have incidental to major effects on the taking of chinook, coho, and chum salmon and also affect the harvest of sockeye and pink salmon originating in Washington's rivers and streams, including those encompassed by the treaty tribes' "usual and accustomed" fishing grounds.

The IPSFC Commissioners' jurisdiction lasts for the period of time in which the Fraser River runs are present in the marine waters of Washington and British Columbia, and in the fresh waters of the Fraser River. The waters over which the Commission has direct jurisdiction also include some of the usual and accustomed fishing places of a small number of the Indian tribes.

The fishery in IPSFC waters by United States citizens is by gillnet, purse seine, and reefnet. The Commission's regulations separately set different fishing seasons for each type of gear. The fixed gear common to other Indian fisheries is not allowed.

The Fraser River runs of pink and sockeye salmon afford Canadian and United States citizens, including treaty Indians, a vast resource for commercial exploitation. It was the recognition of this fact by both the Canadian and United States governments, and of the need for effective management, that originally gave rise to the convention creating the international IPSFC body.

In the early part of this century, the Fraser River generated a prodigious number of fish; in 1913, for example, the Sockeye returning to spawn were estimated to number 37,000,000 fish. Later a landslide blocked large portions of the Fraser River through which the salmon needed to pass on their way to the spawning grounds, and the runs declined to slightly over 1,000,000 sockeye in

[20]The treaty was subsequently extended to include pink salmon (The Pink Salmon Protocol of 1956, TIAS 3867, 8 UST 1058).

1928. A United States commitment to expend a substantial amount of monetary resources in unblocking the Fraser River was the cornerstone of the 1937 convention. The United States received in return the protection of its interest in this fishery by the agency of an international regulatory body. As a result of Commission regulatory efforts, the Fraser River runs have been restored to an average level of approximately 6,000,000 harvestable salmon annually.

The conservation management of the Fraser River runs is as complex as the regulation of the Puget Sound runs. Fraser River pink and sockeye runs are composed of individual runs of fish spawning at varying times and available to the fisheries at different times. Sockeye stocks returning to spawn in any year are generally the product of those which spawned four years earlier but may also include in the run fish having a 3, 5 or 6 year cycle. The effect of coinciding cycles in some years and minimal runs in other years is reflected by the Adams River contribution to the Fraser River sockeye run. Its dominant year reflects up to 10 million fish; the next year, one million; the following year, 50,000; and the lowest of a four year cycle, only 10,000. (Tr. July 11, 1975, pp. 69-70) This and the large number of separate stocks results in the necessity for extremely complex harvest regulation.

Most of the United States' catch occurs after the fish have left the Strait of Juan de Fuca. Five percent is caught in the Strait. Fifty-four percent of the catch is in the San Juan Island area; forty-one percent of the total United States' catch occurs in the last of the United States fishing areas, Point Roberts. A few Indian tribes have "usual and accustomed grounds and stations" in areas under the jurisdiction of the IPSFC. When the Fraser River fish return from the ocean into Washington territorial waters, they are first available for harvest in the usual and accustomed grounds of the Makah Indian Tribe, in the western portion of the Strait of Juan de Fuca.

In general, however, only a small number of treaty Indians, relative to the total number of Indian fishermen,

participate in the harvest of Fraser River stocks. During the time that IPSFC fisheries occur, many treaty fishermen choose to fish for the larger and more valuable Chinook salmon in areas outside of the IPSFC waters, such as Bellingham and Skagit Bays. (Tr. June 26, pp. 69-71. et seq.)

F. HISTORICAL FISHERY.

In 1854-55, Western Washington was sparsely populated with widely dispersed Indian settlements, the estimated population being 7,500 Indians and 2,000 non-Indians. (FF 9, Joint App. 103) While fish had been a major food supply for Indians (FF 4, Joint App. 100), there were considerable fluctuations in the availability and abundance of the fishery resource (FF 3, Joint App. 100). At times the number of returning fish were so low that the Indians' food supply was imperiled. (FF 5, Joint App. 101)

The Indian fishery at the time of the treaties utilized a wide variety of methods to harvest fish, including traps, weirs, dip nets, spearing, hook and line, etc. Although there was some trading of fish between Indians and non-Indians (FF 5, Joint App. 101), it was inconsequential compared to the volume of the present day commercial salmon harvests. (FF 7 and 8, Joint App. 102) The limited commercialization of the fishery resource at that time was due to the small population in the area and inadequate preservation techniques to permit the shipment of fish to markets in larger population areas. (FF 8, Joint App. 102) With the abundance of fish, the small population and limited trade in fish, there was no need to regulate or limit the taking of fish by either Indians or non-Indians. (FF 9, Joint App. 103)

This changed with the invention and perfection of the canning process for fish in the latter portion of the Nineteenth Century. (FF 8, Joint App. 102) Although the first cannery in Puget Sound was constructed in 1877, it was not until about the 1890's that the major impact was felt in Washington. The canning process made it possible to ship the product to distant markets and therefore gave

rise to the development of a large-scale commercial fishery, participation in which has been open to all citizens, both Indians and non-Indians. The volume of fish commercially harvested in Washington reached a peak in about 1914. In recent years, with the implementation of massive hatchery programs by the State of Washington, there has been a substantial replenishment of the fishery stocks in the area.

During this period there was a drastic decline in the number of Indians whose principal occupation was fishing. (FF 33, Joint App. 114) The major cause for this decline was the employment acculturation of the Indians. (FF 33, Joint App. 114)

Acculturation of the western Washington Indians into western culture began prior to treaty times and has continued to the present day. Today, with reference to clothing, language, economic pursuits and general interests, most Indians in Washington are indistinguishable from other citizens. Traditional religious rites and ceremonies are no longer widely observed by most tribes. (FF 33, Joint App. 114)

As a part of that acculturation, Indian fishermen use modern gear, (FF 30, Joint App. 113), and share the same economic motivation to maximize harvests and fishing opportunities as non-Indian commercial fishermen. (FF 31, Joint App. 113) In addition to treaty Indian-only commercial net fisheries, Indian fishermen fish in the regular all-citizen commercial fisheries of Washington and the Pacific Coast. (FF 32, Joint App. 114) They fish with the same gear as non-Indian fishermen, but are not required to purchase licenses or pay landing taxes. (FF 32, Joint App. 114) In the case area at the time of the District Court decision there were 792 Indian fishermen, 6,600 commercial, 283,650 salmon sport fishermen, and 145,000 licensed sport steelhead fishermen. (FF 18, 251, Joint App. 168 and 190). With the exception of the full-time Indian commercial fishermen, who fish in the all-citizen commercial fisheries, Indian fishermen frequently have other occupations, fishing for food and to supplement

their incomes. (FF 32, Joint App. 114) Part-time fishermen of some tribes average $5,000 per year income from fishing. (FF 30 and 110, Joint App. 113 and 142) Indian tribes also run sport fishing businesses on their reservations for which they charge license fees and tribal members serve as guides. (FF 31, Joint App. 113)

While historically the Indians' catch was controlled by the needs of a relatively small human population, gear inefficiencies and tribal custom and religious commandments, (FF 190, Joint App. 169) today it is necessary that the fisheries of Indians, like those of non-Indians, be regulated in order to assure conservation.

Subsequent to the decision of the District Court in *U.S. v. Washington* and its implementation guaranteeing treaty Indians a given number of fish from each of the runs, there has been a change in the composition of the commercial fishery. There has been an increase in the Indian fleet both in quantity and quality; i.e., the number of Indian fishermen has increased; so, too, has the amount and efficiency of the gear which is utilized by the treaty Indian fleet. The nontreaty commercial fleet has declined, in part due to the impact of the decision reducing the fishing opportunity for nontreaty citizens, in part due to a state moratorium on the issuance of licenses, and in part because there has been available since 1975 a state buy-back program, federally financed, whereby vessels and licenses are bought and removed from the fishery.

There also have been regulatory changes. The United States enacted the Fishery Management and Conservation Act of 1976 (16 USC § 1801, et seq.) which asserted preemptive jurisdiction over fishing in a zone from 3 to 200 miles off the coast of the State of Washington. Thus, even higher percentages of harvests of stocks from the case area occur outside the jurisdiction of the State of Washington than at the time of trial, which were: Chinook — 58.0%; Coho — 55.3%; Pink — 29.4%; Chum — 2.6%. As previously noted, chum salmon are not commonly harvested in the ocean.

Another source of the increase in the treaty Indian fleet has been the District Court's permitting the post-trial intervention of twelve additional tribes. Generally, for those tribes which are not recognized by the United States government, the court has found conditional rights which permit those Indians with an appropriate blood quantum to fish as treaty Indians if one of the recognized tribes invites their participation.

G. TREATY BACKGROUND.

The United States claimed the area which is now the state of Washington by discovery, settlement and treaty extinguishment of conflicting claims of Spain, Russia and Great Britain. (FF 15, Joint App. 106) In 1848, the Oregon Territory, which included Washington, was created, but Indian claims were not extinguished. (FF 15, Joint App. 106) Thereafter, in 1850, Congress authorized the negotiation of treaties with Indian tribes in Oregon Territory to extinguish their claims to lands lying west of the Cascade Mountains. (9 Stat. 437) In 1853, the act creating the Washington Territory continued the authority to make treaties with the Indians, and appropriations were made for that purpose. (FF 15, Joint App. 106)

Isaac Stevens was appointed Governor and Superintendent of Indian Affairs of the Washington Territory. (FF 17, Joint App. 107)

At that time the Indians in western Washingon did not have a formal political structure. (FF 15, Joint App. 106) They were organized loosely, if at all. Governor Stevens therefore created tribes and bands with leaders or chiefs in order to have political entities with which to negotiate. (FF 17 and 18, Joint App. 107, 108)

The purpose of the treaties was to extinguish Indian claims to the land in Washington Territory. (FF 19, Joint App. 108) Governor Stevens and the treaty commissioners were not authorized to grant to the Indians or treat away on behalf of the United States any governmental authority of the United States. (FF 19, Joint App. 108)

At the treaty negotiations the Indians' primary concern was that they have freedom to move about to gather food, particularly fish, at their usual and accustomed fishing places. (FF 20, Joint App. 109) The words of One-lun-teh-tat, a Skokomish Indian spokesman, addressed to Governor Stevens, expresses the Indian concerns about relinquishing their claims to lands and being left with small reservation areas (Ex. PL-15, Joint App. 330):

> I wish to speak my mind as to selling the land—Great Chief. What shall we eat if we do so? Our only food is berries, deer and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.

In response the Indians were assured that while they would have the freedom to move about to secure food and fish, the white man also would be allowed to fish. (FF 20, Joint App. 109)

Governor Stevens, in discussing the policy that he intended to pursue during negotiations with the tribes, in a letter dated September 16, 1854 to the commissioner of Indian Affairs, said:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, *the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing.* It is therefore desirable that this question should be set at rest by law.

(Emphasis supplied) (Ex PL 47 p. 456 Joint App. 327)

Governor Stevens' concern with protecting Indians from an exclusion from the fishery was reflected by his specifically recognizing the Indians' ability to go outside of reservation areas for the purpose of harvesting fish. His statement at the Treaty of Point Elliott on Monday, January 22, 1855, was:

> We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and *where you will be able to pass in canoes over the waters of the Sound and catch fish* and back to the mountains to get roots and berries.

(PL Ex 14, Joint App. 329-30) (Emphasis supplied)

Subsequently, in the negotiation of the Treaty of January 31, 1855, with the Makah Indians, Governor Stevens reassured the Indians that he did not intend to stop their fisheries but he made clear that the whites would also fish. (Ex. PL-16(b), Joint App. 331)

The concern with permitting the Indians to have the opportunity for access to the fishery was also reflected in the report by George Gibbs, frequently referred to as the author of the treaties, to Captain McClellan on March 4, 1854:

> * * * *They (Indians) require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found.*
>
> The subject of the right of *fishery,* in its present position, is believed to be one concerning which difficulties may arise. *It is certain that the intention of Congress never was that the Indians should be excluded from them*; but as no condition to this effect was inserted in the donation act, the question has been started whether persons taking claims, including such fisheries, do not possess the right of *monopolizing them.* It is, therefore, proper that this also should be set at rest by law.

(Ex PL-9, Joint App. 326) (Emphasis supplied)

Subsequently, in the course of the negotiations on the Treaty of Point-No-Point, the Indians were advised, that they would have the privilege of going where they pleased to fish, if they relinquish land claims.

> Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. That where a small tract alone was left, *the privilege was given of going wherever else they pleased to fish* and work for the whites. If you can cultivate more land than this, you can have it.

(PL Ex 15, Joint App. 330) (Emphasis supplied)

Although there was no intent to exclude the Indians from using fisheries for economic gain, it was intended that they become agriculturists, diversify their economy, learn western skills and trades in order to accomplish their transition into western culture. (FF 21, Joint App. 109) The treaty provisions contemplate that the reservations would become productive farms and obligated the United States to provide schooling and tradesmen to train the Indians.[21] The annual reports of the Indian agents in the years immediately following the signing of the treaties show that the government was attempting to carry out those treaty provisions. (Exs. PL-6, PL-40, PL-41, PL-42) It was contemplated that the Indians would become less dependent on fish as they became increasingly westernized and successful in their agricultural pursuits. (Ex. D-1, p. 27)

The treaty negotiations were carried on in Chinook jargon, a trade medium used by the tribes. (FF 22, Joint App. 110) Colonel Shaw, the government interpreter, translated the treaty language into Chinook jargon, which was in turn translated by Indian interpreters into native languages (FF 22, Joint App. 110) It is probable that there were Indians at each council who would have spoken or understood some English. (FF 22, Joint App. 110) Although the vocabulary of Chinook jargon was not adequate to express precise legal language, the general meaning of the treaty language could be explained. (FF 22, Joint App. 110) The treaty commissioners probably used the phrase "usual and accustomed" and "in common with" in their common parlance. (FF 24, Joint App. 111)

The phrase "usual and accustomed fishing grounds" was all inclusive and intended by all parties to the treaty to include reservation and off-reservation areas. (FF 24, Joint App. 111) It was probably used in a restrictive sense, not intended to include areas where use was occasional or incidental. (FF 24, Joint App. 111)

George Gibbs, a lawyer, surveyor, ethnologist and probably the most informed member of the treaty

commissioners, observed that the Indians' "fisheries were held in common, and no tribe pretends to claims from another, or from individuals, seignorage for the right of taking." (FF 25, Joint App. 112) At treaty times Indians and settlers shared common fishing grounds (FF 13, Joint App. 104), so the concept of common user interests was familiar to them, and the concept was capable of expression in the Chinook jargon. (FF 24, Joint App. 111)

SUMMARY OF ARGUMENT

This litigation, which has been increasing in complexity at an ever-accelerating rate, can be made quite simple, for the key to this litigation is found in the answer to a single question. What is the meaning of the phrase:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens* of the Territory, * * * (Emphasis supplied)

Treaty of Medicine Creek, Article III, 10 Stat. 1132 (1854).

All of the complexities in this litigation have arisen because the District Court and the Ninth Circuit gave the wrong answer to this question. Those complexities will disappear if the right answer be given.

In view of the lower federal courts, this treaty language confers upon the Indian treaty fishermen a virtual guarantee that they will harvest more than half of the harvestable fish. In our view, this language means that each individual fisherman, Indian and non-Indian alike, has the right to participate in the fishery on a nondiscriminatory basis and that the individual Indian treaty fisherman cannot be denied access to the fishery needed to exercise that right. This language neither requires nor even permits the allocation decreed by the lower federal courts.

We first take up this basic interpretive question as part one of this brief and then address the subordinate issues as the second part of the brief. Those are issues

[21] See, e.g., Treaty of Medicine Creek, art. 10, 10 Stat. 1132; Treaty of Point-no-Point, art. 11, 12 Stat. 933.

which become essentially irrelevant if the meaning of the treaty language which we urge is correct; if it is incorrect, and if the meaning adopted by the lower federal courts is upheld, these issues become unavoidable. These issues are: The conflict between the directives of the District Court and the requirements of a treaty with Canada, as implemented by the regulations of the International Commission created by that treaty pp. 63-81 *infra*; the abuse of discretion, if allocation is discretionary, in allocating in excess of 50% of the fishery to a relatively small number of tribal fishermen pp. 81-94 *infra*; the excessive interference by the District Court in the state's management and conservation of the fishery resource pp. 99-114*infra*; and the ability of the state to comply with a judicial mandate to allocate the resource between treaty and nontreaty fishermen pp. 94-98 *infra*.

The treaty language, probably drafted by a lawyer who was one of the treaty commissioners, was intended to secure to the Indians access to the fishing grounds (*U.S. v. Winans*, 198 U.S. 371 (1905), and *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919) and an opportunity to participate in the fishery along with all other citizens. Neither Indian nor non-Indian was to be allowed to exclude the other from the fishery. (*Winans*, *supra*; *Puyallup III*, *supra*). Nor was there contemplated any quantified allocation of fish between the two groups of fishermen.

The common law of fisheries, as developed in England and adopted in this country, is fully compatible with treaty language. The treaties incorporated the common law concept of a "common fishery;" i.e., a public domain in navigable waters in which all citizens have an equal opportunity to fish. (*Infra*, 48)

A review of the historical evidence surrounding the actual treaty negotiations, reflecting the view of the treaty commissioners and the Indians, is completely consistent with the common law concept of the common fishery, and inconsistent with any notion of a right to a quantitative allocation or a specific percentage of the fish *infra*. This

examination of the common law of fisheries and the historical background of the treaty negotiations is made because of the rule of construction enunciated by this Court in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 206 (1978): Treaty provisions are to be construed in the light of the "common notions of the day and the assumptions of those who drafted them."

We also examine, as did the District Court, contemporaneous dictionary definitions of the word "common." Far from supporting the conclusion of the lower federal courts that the fishery resource must be divided between the two groups of fishermen, treaty Indians and all other citizens, the definitions support instead our conclusion that the resource is truly *public; i.e.*, equally open to all on an individual basis. (pp. 48-56, *infra*) This same conclusion as to the meaning of the word "common" is bolstered by the specific language of one of the Stevens treaties, which grants to the Indians a "right in common with citizens * * * to travel upon all public highways," i.e., a right of access to and equal enjoyment of a public resource. (*Infra*, p. 55)

Finally, but most importantly, we examine recent interpretations and applications of the treaty language in the *Puyallup* series of cases, focusing on the "issue of equal protection implicit in the phrase 'in common with' " as used in the treaties. *Puyallup I*, *supra*; at 403; cf., *Puyallup II*, *supra*. (*Infra*, pp. 86-90) The 50%-plus allocation required by the lower federal courts is, as we demonstrate, completely incompatible with the equal protection requirements implicit in the treaty language. Our reading of the treaty language, in contrast, is completely consistent with, and indeed is demanded by, equal protection principles. (*Infra*, pp. 89-90)

ARGUMENT

A. THE STEVENS TREATIES NEITHER REQUIRE NOR PERMIT A FIFTY PERCENT-PLUS ALLOCATION OF THE WASHINGTON FISHERY TO THE TREATY INDIANS.

1. Introduction.

This litigation is founded upon six separate treaties which include a reference to fishing in the Washington Territory. The following is a typical treaty provision although there are minor differences of language in the six treaties:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens* of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, * * * on open and unclaimed lands. Provided, however, that they shall not take shellfish *from any* beds staked or cultivated by citizens.

Treaty of Point Elliott, Art. 5, 12 Stat. 927 (A-131, Pet. No. 78-119). (Emphasis supplied.)[42]

The heart of the controversy that brings the parties to this Court is the determination by the District Court in 1974 that:

> By dictionary definition and as intended and used in the Indian treaties (and in this decision) 'in common with' means *sharing equally* the opportunity to take fish at usual and accustomed grounds and stations; therefore, non-treaty fishermen shall have the opportunity to take up to 50% of the harvestable number of fish that may be taken by all fishermen at usual and accustomed grounds and stations * * *

[42]Two treaties, the Treaty of Point No Point, 12 Stat. 933, and the Treaty with the Makahs, 12 Stat. 939, refer to citizens of the "United States." The proviso concerning shellfish was omitted from the comparable provision of the Treaty with the Yakima, 12 Stat. 951, for the obvious reason that the Yakima Nation, occupied territory to the east of the Cascade Mountains, where shellfish were not found.

384 F.Supp. at 343.[43] Joint App. 88-89.

This quantitive allocation is the cornerstone of every major subsequent enforcement order of the District Court, and provides the basis for the 1977 injunctive orders which are the immediate subject of this appeal. (See App. A35-127 Pet. No. 78-119).

Although the Ninth Circuit in its first decision, 520 F.2d 676 (1975), (Joint App. 39), upheld the District Court's 50%-plus allocation, it did not follow the lower court's rationale that the allocation was required by the dictionary definition of the term "common." The Ninth Circuit Court for good reason ignored the historical-semantic approach of the District Court. Even if " 'in common with' means sharing equally the opportunity to take fish * * *," (384 F. Supp at 343, Joint App. 89) the 50%-plus allocation does not inevitably follow, as the Ninth Circuit apparently realized. The critical question is: how is equality of opportunity to be measured? Is it to be equality of opportunity among all *individual* fishermen, Indian and non-Indian alike? Or is it to be equality between two *groups* of fishermen, one treaty Indians and the other all other citizens, both Indian and non-Indian?

This initial question of how equality is to be measured is pivotal. It must be answered before considering the question as to what, if any, limits the treaties place upon the state's power to regulate the fishing resource. The answer to this initial question ultimately requires a resolution of the conflicting claims of private individuals, i.e., the individual fishermen, treaty and nontreaty; the dispute between the governmental entities involved is secondary. After all, the treaty language is cast in terms of "said Indians" and "all citizens of the Territory"; the present day individual fishermen are simply their legal successors.[44]

[43]Actually, the court's allocation formula allots over 50% of the fish resource to the various Indian tribes. See discussion at pp. 6-7, *infra*.

[44]This Court noted in *United States v. Winans*, 198 U.S. 371 (1905) that:

In addressing this initial question, the Ninth Circuit correctly understood that the District Court's allocation could be justified only if the equality is measured between two groups, and not among individuals. To remedy the defect in the District Court's rationale, it unearthed the common law concept of a cotenancy in property. In the view of the Ninth Circuit, the effect of the "in common with" treaty provision was mutually to endow the United States and the newly constructed Indian tribes with an interest in the fish resource "analogous to a contenancy." 520 F 2d *supra*, at 685, Joint App. 50.[15] This conceptual maneuver enabled the court to characterize the District Court's allocation as an equitable remedy for a breach of a cotenant's fiduciary duty by the state, as successor to the cotenancy interest of the United States. Apparently, the state's breach of duty consisted of allowing its nontreaty citizens as a group to harvest a share of the salmon and steeelhead in quantities substantially greater than those garnered by its treaty Indian citizens as a group, even though each individual of both groups had an equal opportunity to fish. Id., at 687.

The Ninth Circuit utilized the cotenancy analogy in affirming the respective percentages of the fish resource allocated to non-treaty and Indian treaty fishermen. Referring to the "formal equality" of the bargaining positions of the United States and each Indian tribe, the court concluded that both parties had an equal equity in their jointly-held property that was properly reflected by a 50-50 partition of the fishery. *Id.*, at 688, Joint App. 52.

When the Ninth Circuit subsequently reconsidered its cotenancy theory as the foundation for 50%-plus allocation, fissures in that foundation began to appear to

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The reservations were in large areas of territory and the negotiations were with the tribe. *They reserved rights, however, to every individual Indian, as though named therein.* Id., at 381. (Emphasis supplied)

[15] In a later opinion which is the subject of this appeal, the Ninth Circuit also described the Indians' interest as a "quasi cotenancy." 573 F.2d 1123, 1130 (1978). (App. A-12 Pet. No. 78-119)

members of the court. In the panel decision which is immediate subject of this appeal, 573 F.2d 1123 (1978), Judges Kennedy and Wallace, two members of the panel, expressed their misgivings about the correctness of the 50%-plus allocation; and Judge Kennedy's misgiving was expressed in terms of the doubtful applicability of the cotenancy analogy. To quote Judge Kennedy:

> * * * [I]t has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of those treaty rights.
>
> I recognize that the opinion of the court does not advocate strict adherence to the technical rules of common law cotenancy as a means of resolving this case. The defects of the analogy, however, should be noted specifically, since alternative justifications for the apportionment rule have not yet been fully discussed. This panel is bound by *United States v. Washington, supra,* and thus I concur in today's judgment. However, I would not attempt to restate or explain that decision by means of an inappropriate analogy. We do not sustain the dignity of the treaties in question by deriving an apportionment rule from a hesitant reference to property concepts that are unrelated to the rights asserted by the parties.

Id. at 1136 (App. A-28 Pet. No. 78-119).

To quote Judge Wallace:

> While I sympathetically agree with Judge Kennedy's statement that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights," I am compelled to join with Judge Goodwin based upon our prior decision in *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975), *cert. den.*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976).

Id. at 1136 (App. A-28 Pet. No. 78-119.)

The Ninth Circuit in its original decision and its latest decision, which is the subject of this appeal, was correct in searching for a common law analogy for construing the treaty. The draftsmen of the treaty were no doubt aware of the common law, for the District Court found that "[t]he treaty language 'in common with' was

probably introduced by George Gibbs, who was a lawyer and advisor to Governor Stevens." FF 23, Joint App. 110.

The court unfortunately selected the wrong analogy. Instead of utilizing the concept of the cotenancy, it should have utilized the common law concept of a "common fishery." This is the common law concept which Gibbs intended to incorporate in his drafting of the treaty, as is shown by the history of the treaty negotiations. It is also the concept which the Solicitor General successfully urged upon this Court in *United States v. Winans*, 198 U.S. 371 (1905), the first major decision of the Court construing the "in common with" language.

As we shall also show, this concept of a common fishery also fits best with contemporaneous dictionary definitions of the word "common." Like the Ninth Circuit, the District Court, in searching the dictionaries of the day, was looking in the right place, but did not look far enough.

2. The Fishery Contemplated by the "In Common With" Provision of the Stevens Treaties is Inconsistent with an Allocation of a 50 Percent-Plus Portion of the Fishery to the Treaty Tribes.

The finding by the District Court that the "in common with" language of the Stevens treaties was intended to mean a "sharing equally" of the fishery between treaty Indians and nontreaty fishermen as groups, not individuals, and the Ninth Circuit's determination that the same phrase created a quasi-contenancy interest for the Indians in the fish resource, both purport to be definitive interpretations of the treaties, and were rendered as a matter of law. Both interpretations are inconsistent with the opinions of this Court. Moreover, both represent attempts to inject into the treaty language notions which the historical background of the treaties and the legal milieu in which their terms were conceived do not support. As recently as March of 1978, this Court reversed the Ninth Circuit for engaging in a similar non-historical reconstruction of these treaties:

> These instruments (treaties, statutes, and resolutions), which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

The failure of both the District Court and the Ninth Circuit to abide by this canon of treaty interpretation has produced, in addition to a great injustice, an historical anomoly. Indian tribes situated within the state of Washington now enjoy an entitlement, the very claim to which the Stevens treaties were intended to withdraw from them: The right to exclude nontreaty fishermen from fishing grounds.

(a) Historical Background.

In the aftermath of the passage of the Land Donation Act of 1850, 9 Stat. 437, substantial numbers of settlers began to pour into the Oregon Territory west of the Cascade Mountains, spreading out over an area that encompasses what today is the western portion of the state of Washington. Whether by oversight or deliberate neglect, Congress in enacting the Donation Act broke with its previous policy of prohibiting the entry of claims by settlers to lands on which the Indian title had not been extinguished. In order to render the Indians of the area amenable to white settlement, and to defuse the potential for hostilities erupting over conflicting claims of Indians and non-Indians, Isaac Stevens, then Governor of the Washington Territory, was commissioned to treat with the various Indian residents of the Washington Territory.

One of Governor Stevens objects in negotiating the treaties with the various bands of Indians was to minimize contacts between the settlers and the Indians. The Governor therefore sought and obtained the agreement of the various bands to confine their homes to reservations to be set aside for their use. It was recognized, however, that confinement to the reservation was impossible if the

Indians were to sustain themselves. As George Gibbs, the probable draftsman of the Stevens treaties, observed:

> They [the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries and fish, where those articles can be found.

(Ex. PL-9, Joint App. 326)

Accordingly, the treaty commissioners proposed and ultimately secured for the Indians the right to leave their reservations for the limited purpose of seeking food for their subsistence, of which fish constituted a principal part.

The treaty commissioners foresaw, however, that a treaty-secured right of leaving the reservation might not in itself be sufficient to assure the Indians an access to the fishery. Several months before the execution of the first of the treaties, Governor Stevens expressed concern that settlers entering upon land claims might assert their common law right (see discussion, *infra* 32) to monopolize the fishery in waters adjoining their lands, and thereby entirely exclude Indians from fishing at such locations:

> The subject of the right of fisheries is one upon which legislation is demanded. It never could have been the intention of Congress that Indians should be excluded from their ancient fisheries; but, as no condition to this effect was inserted in the donation act, the question has been raised whether persons taking claims, including such fisheries, do not possess the right of monopolizing. It is therefore desirable that this question should be set at rest by law.

Ex. PL-47, Joint App. 327. The identical sentiment was expressed by George Gibbs several months before, in March of 1854. Ex. PL-9, Joint App. 327)

Gibbs' and Stevens' concerns over the settlers' exclusion of the Indians from their usual fishery grounds was the genesis of the fishing provision included in each of the Stevens treaties at issue. By providing that Indians were to have "the right of taking fish at all usual and accustomed grounds and stations," the treaty secured for them access to the usual fishing grounds, and the right to

fish in those places, which might otherwise have been foreclosed by the claims of private property owners.

From the record of the negotiations, and the correspondence surrounding the proposal and execution of the Stevens treaties, three notions emerge which illustrate the meaning of the off-reservation fishing provision. First, the right of fishing secured to the Indian signatories consisted of a right of access; that is, a right to seek out and pursue the fish in the customary areas where the fish might be located. The right did not consist of an entitlement to have fish shepherded into whatever locations at which the Indians wished to set up their fishing gear. The treaty right was designed to insure for Indians, in the words of Commissioner George Gibbs, a "*liberty of motion* for the purpose of *seeking* * * * *fish*," Ex. PL-9, Joint App. 327 (Emphasis supplied). In explaining the treaties to the Indians present at the treaty signings, Governor Stevens and his fellow commissioners enunciated the same understanding of the fishery provision:

> We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, *and where you will be able to pass in canoes over the waters of the Sound and catch fish* and back to the mountains to get roots and berries.

Ex. PL-14, Joint App. 330, (emphasis supplied).

> They would have the right of *travelling throughout the country for lawful business; fishing* at accustomed places *in common with the whites.*

Ex. PL-22, Joint App. 331, (emphasis supplied).

> Mr. Simmons, the agent, explained that if they kept half their country, they would have to live on it, and would not be allowed to go anywhere else they pleased. *That where a small tract alone was left, the privilege was given of going wherever else they pleased to fish* and work for the whites. If you can cultivate more land than this, you can have it.

Ex. PL-15, Joint App. 330 (emphasis supplied).

Second, the right of fishery secured to the Indians was not of such a nature as to entitle them to exclude

non-Indians from fishing at the same or any other locations. As between Indians and the "citizens of the Territory," the right of fishery was to be public, a "common" right, one from which no one could be excluded. On at least two occasions during the negotiations, Governor Stevens made reference to this aspect of the treaty:

> They would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the mountains for berries, always provided that they were to remain upon their reservation when required, and *were in no manner to interfere with the whites when off of it.*

Ex. PL-22, Joint App. 331-32, (emphasis supplied).

> Kalchote Neah Bay * * * He thought — he ought to have the right to fish and to take whales and get food where he liked. He was afraid that — if he could not take halibut — where he wanted, he would become poor.
> * * *
> Gov. Stevens informed them that so far from wishing to stop their fisheries, he wished to send them oil kettles, and fishing apparatus.
> * * *
> *Gov. Stevens replied that 'he wanted them to fish but that the whites should fish also.'*

Ex. PL-16(b), Joint App. 331, (emphasis supplied).

In fact, Governor Stevens' understanding that the fishery rights secured were non-exclusive in nature harmonized with the Indians' own view of the right of the fishery. As Commissioner George Gibbs later observed:

> * * * as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

Ex. G-4, Joint App. 333.

Third and finally, the object which the special and general rights of access to the fishery secured to the

Indians were designed to serve was the provision of a food resource for personal consumption. The treaty provisions were not intended to insure a special commercial fishery for the Indians, especially one that would interfere with the fishing industry of the incoming settlers. This sentiment was expressed by the treaty commissioners in the minutes reflecting the commission's consideration of the provisions of the Treaty of Medicine Creek in late December of 1854:

> It was also thought necessary to allow them [the Indians] to fish at all accustomed places, since this would not in any way interfere with the rights of citizens and was necessary for the Indians to obtain a subsistence.

Ex. PL-10, Joint App. 327.

And on two separate occasions, one before and the other after the execution of the treaties, Governor Stevens referred to the same limited objects of the Indian treaty fishing right:

> The provisions as to reserves and as to taking fish, pasturing animals, and gathering roots and berries had strict references to their condition as above, to their actual wants and to the part they play and ought hereafter to play in the labor and prosperity of the territory. *It may be here observed that their mode of taking fish differs so essentially from that of the whites that it will not interfere with the latter. They catch the salmon with spears in deep water and not with seines or weirs.* (Lt. of Governor Stevens to the Commissioner of Indian Affairs in Washington, D.C., Dec. 30, 1854.)

Ex. PL-11, Joint App. 329, (emphasis supplied).

> Office Supt. Ind. Affairs
> Olympia W.T. Dec. 6, 1856
>
> Capt. E.S. Fowler,
> Special Indian Agent
> Port Townsend, W.T.
>
> Sir,
>
> I have to request that you will furnish me at the earliest practicable moment with all the information

you can collect in regard to the Fisheries of the Sound, Straits and Coast — *to what extent they might enter into our commercial operations and made an article of export* — the market — the craft best adapted to the business the best point for a depot on the Sound. The extent the whole business might be developed. The extent to which the labor of the Indians could be availed of. *Is there any likelihood* that, for some years, *the quantity of fish will be diminished as to ~~straighten the Indians~~ interfere with the subsistence of the Indians.*

Truly & respectfully
Isaac I. Stevens
Gov. & Supt.

Ex. PL-7, Joint App. 332 (Emphasis supplied).

In summary, by their insertion of the off-reservation fishing provisions into the Stevens treaties, the treaty commissioners intended to provide a means of subsistence[26] for the individual Indians by affording them a right to pursue the fishery outside their reservations. The right of access secured was a participation in public fishery, exclusive to none but open to all.

(b) **Legal Milieu.**

In drafting the language of the Stevens treaties, Commissioner George Gibbs, a lawyer by trade, (FF 23, Joint App. 110) did not choose his terms without recourse to a body of law on the subject of fisheries. By the nineteenth century, there had developed an extensive common law of fishery, christened by Sir Matthew Hale in his opus, *De Jure Maris* (circa 1667), and consuming a number of pages of scholarly treatment by Chancellor James Kent in his famous *Commentaries on American*

[26]See, also the finding of the Indian Claims Commission in *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477, 508 (1959):

> (3) The reserving of Makah fishing rights at usual and accustomed places under the 1855 Treaty was founded upon the need of the petitioner tribe to maintain its then subsistence economy which was based primarily upon the immediate products of the sea, *and in no sense was this treaty provision a guarantee of future commercial fishing rights.* (Emphasis supplied)

Law (5th Ed., 1844).[27] An understanding of this law of fishery is of paramount importance for the interpretation of the treaty provisions, in view of this Court's injunction in *Oliphant v. Suquamish Indian Tribe, supra* at 206, that treaties "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumption of those who drafted them." See discussion at pp. 31-35, *infra*.

At the time the Stevens treaties were negotiated, Anglo-American jurisprudence conceived of the right of fishing as an interest in real property. The right attached to the fee ownership of the soil underlying and adjoining the waters where the right could be exercised. In short, the right of fishing was an easement over real property, detachable from the fee and capable of being freely transferred. See 3 Kent, *Commentaries, supra* at pp. 408-418.

The rights of fishery affixed to real property varied with the identity of the fee title holder, public or private. The public domain, for example, was presumed to support a public right of fishing for all citizens, as the brief of the Solicitor General to this Court in the case of *United States v. Winans*, 198 U.S. 371 (1905) (hereinafter cited as Solicitor's *Winans* Brief) explains:

> Under English law there were three kinds of fisheries. A free fishery, or exclusive right of fishing in a public river, which was a royal franchise; such right to be valid must be very old, because Magna Charta and the later charters directed that rivers fenced should be laid open and forests be disafforested. A several fishery was one vested in or derived from the owner of the soil. *Both a free fishery and a several fishery were exclusive rights, in which they differed from a common of piscary.* (2 Bl. Com., 39, 40; id., 417 *et seq.*) But it was a general and settled principle of English law that *there was a public domain in navigable waters and their beds extending to the*

[27]In a recent decision on the subject of the fishery, this Court had occasion to describe Chancellor Kent as "the country's foremost legal scholar." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278, n. 13 (1977).

> *usual high-water mark, and that within that limit the right of fishery is common to all, and this principle has been generally recognized in the United States, excepting so far as it has been restrained by positive law or by grant from the State. In this country the presumption is against the existence of an exclusive fishery.* (*Weston* v. *Sampson*, 8 Cush., 346, 352; *Carson* v. *Blazer*, 2 Binn., 475; *Yard* v. *Carman*, 2 Pen. (N.J.), 681, 686; *Melvin* v. *Whiting*, 7 Pick., 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533.)
>
> The riparian owners on principal rivers of a State have not an exclusive right to fish, *but the right is vested in the State and open to all.* (*Carson* v. *Blazer*, *ut sup.*; *Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R., 71).

Solicitor's *Winans* Brief, *supra*, at 43-44 (emphasis supplied).[28]

As the Solicitor noted in his discussion, the right of fishery attaching to the public domain — the ocean, bays, estuaries, and navigable portions of rivers[29] — was vested in the state, as an incident to its fee ownership of the soil underlying these bodies of water. See *Shively v. Bowlby*, 152 U.S. 1, 11-12, 57-58 (1894). But the state's holding of this title and the appurtenant fishing right was not like that of a proprietor, but rather of a fiduciary, as the Court observed in *Smith v. Maryland*, 59 U.S. 71, 74 (1855):

[28]In the common law, there had developed a considerable confusion of terminology used to describe the exclusive and non-exclusive rights of fishery. According to Chancellor Kent, the exclusive right of fishery in certain waters was alternatively denominated a "several fishery," "free fishery," or "common of fishery." Kent, *Commentaries*, supra, at 409-410, and the terms "common fishery," and "common right of fishery" denoted a right "for all mankind." *Id.*, at 411, 413, 414, 418.

The above quotation illustrates the problem of terminology. Solicitor General Hoyt, in using the term "common of piscary" is obviously referring to the non-exclusive right which Chancellor Kent (and ourselves as well) would term "a common fishery."

[29]By extending the concept of navigability, from the narrow English concept of waters in which the tide ebbs and flows, to the present day concept of navigability, the territorial extent of the common fishery has been greatly expanded in the United States. See *Shively v. Bowlby*, *supra*, at 43.

> But this soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well as shellfish and floating fish.

See also, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

Thus, under the system of fishing rights prevailing through the nineteenth century, citizens enjoyed the privilege of a free and public fishery on all of the waters of the state except those portions of non-navigable waters adjoining privately-owned land. For present purposes, two aspects of this right must be emphasized.

First, the right of common fishery on the public waters of the state was a non-exclusive one. No one person or group of persons was entitled to exclude others or monopolize the fishery or any portion of it in those water subject to a common right of fishing. As Chancellor Kent noted:

> This private right of fishery is confined to fresh water rivers, unless a special grant or prescription be shown; *and the right of fishing in the sea, and in the bays and arms of the sea, and in navigable or tide waters, under the free and masculine genius of the English common law, is a right public and common to every person.*

3 Kent, *Commentaries*, *supra*, at 412. (Emphasis supplied).

Second, all rights of fishery, private and public, were by nature *terra firma*, affixed to and defined by the metes and bounds of real property. Rights did not attach to a particular run, school, or species of fish. The notion that an individual or group could have a form of exclusive interest in a run of fish destined for a particular river was simply unknown to the law. See *Geer v. Connecticut*, *supra*, at 538-40; *Missouri v. Holland*, 252 U.S. 416, 434 (1920). A person who enjoyed a public or right of fishing at a particular location therefore had no right to restrain the lawful exercise of fishing rights by another at some other location.

The meaning of the fishing provisions incorporated by draftsman George Gibbs into the Stevens treaties must be understood against this background of the common law. In allowing a reservation of fishing rights at certain fishing sites located in the territory which the Indians were ceding, Gibbs and his fellow treaty commissioners recognized and created for the benefit of the Indians what was in essence an easement right upon real property. The right reserved in the land is no different than that which any title holder may reserve in the real estate that he sells.

Secondly, by defining the nature of the right reserved as one to be exercised "in common with the citizens of the Territory", it is evident that Commissioner Gibbs intended to secure for the Indians, in the location of their off-reservation customary fishing grounds, the same rights that citizens might enjoy in a common fishery.[30]

For Indians, the provision of the common right of fishing would entail no essential change in their prior entitlement. As Commissioner Gibbs observed, the Indians of Washington Territory had always regarded the right of fishery to be what the common law termed the "common right":

> as regards the fisheries, they are held in common, and no tribe pretends to claim from another, or from individuals, seignorage for the right of taking, in fact, such claim would be inconvenient to all parties, as the Indians move about on the sound particular, from one to another locality, according to the season.

[30]Of course, as between the "citizens of the Territory" and the United States, the treaty did not guarantee to the citizens that all such locations would remain common fisheries for their benefit. By allowing the entry of claims upon the riparian lands of the public domain, the United States, and later the state, allowed such landholders to exclude other nontreaty citizens from their property and, in the case of nonnavigable waters, from the fishery itself. But, as the Solicitor noted in his *Winans* Brief, *supra*, at 49, the claims of private landowners were subject to the easement right created by the treaties for the benefit of the Indians. Though the riparian lands might cease to be public domain, as to the Indians, the right of fishery at their customary sites would always be the right attaching to the public domain — the "common right of fishing." Solicitor's *Winans* Brief, *supra*, at 16.

Ex. G-4, Joint App. 333. But by securing the "common right" to Indians by treaty, the treaty commissioners guaranteed to them an access to the fishery even after the public domain upon which they formerly roamed had passed to private property owners.

Measured by these "common notions of the day and the assumptions of those who drafted them", *Oliphant v. Suquamish Indian Tribe*, *supra* at 206, the boundaries of the Indian treaty right become apparent. The Indians' right of fishery at their customary fishing sites is a non-exclusive one, as the Solicitor General noted in his *Winans Brief*, *supra:* it is the right *"public and common to each person,"* 3 Kent, *Commentaries*, *supra*, at 412, and not a right of preference for any one person or group. Both the nature of the easement reserved and the guarantee of the rights of common fishery protect the Indians from exclusion from the fishery at such locations by those who would monopolize it, as this Court recognized in *United States v. Winans*, supra. By the same token, the nature of the right prevents the Indians themselves from monopolizing the fishery at such locations. Cf., *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165, 176, n. 16 (1977).

More importantly, the Indians' reserved right, like all rights of fishery recognized in the common law, is defined by and attached to real property — their "usual and accustomed grounds and stations." By its nature, the right does not consist of an interest in the fish themselves that would entitle the Indians to restrain the lawful exercise of fishing rights by nontreaty citizens at the same locations. A fortiori the right reserved does not establish any cognizable interest in the fish or lawful fishing activities outside the boundaries of the "usual and accustomed grounds."

This common-law understanding of the "in common with" language of the treaty fishing provision corresponds with the "common parlance" use of the term 'common' "as found in a contemporaneous dictionary definition." 384 F. Supp., at 356, Joint App. 111. In enunciating its

interpretation of the treaty language, the District Court abstracted only a portion of the definition of 'common' set forth in the 1828 and 1862 editions of Webster's *American Dictionary of the English Language*. The full definition is set forth below; portions quoted in the District Court's opinion are italicized:

> Common. 1. *Belonging equally to more than one, or to many indefinitely;* as, life and sense are common to man and beast; the common privileges of citizens; the common wants of men.
>
> 2. *Belonging to the public; having no separate owner.* The right to a highway is common.
>
> 3. *General; serving for the use of all;* as, the common prayer.
>
> 4. Universal; belonging to all as, the earth is said to be the common mother of mankind.
>
> 5. Public; general; frequent; as, common rapport.

Ex. PL-86, Joint App. 325.

Considered in its entirety, Webster's definition of the term "common," as applied to property, connotes the type of property interest in which no one person or group can have preferred rights. Only a strained reading of the definition would support the District Court's understanding of the term "common" as describing a *divisible* property interest.

In view of the grave consequences that have attended the District Court's allocation scheme, the significance of the court's misconstruction of the dictionary definition of "common" cannot be overemphasized. The District Court rested the legitimacy of its 50%-plus allocation of the fishery squarely upon its reading of the dictionary definition. The error in that reading having been exposed, the legal basis for the court's allocation collapses on its own terms.

Additionally, our reading of the "in common with" language of the Stevens treaties as guaranteeing to the Indians a public right of access to the fishery consistent with its use in another portion of the same article contained in one of the Stevens treaties, the Treaty with

the Yakimas (12 Stat. 951, A-133 Pet. No. 78-119). The paragraph preceedng the reference to fishing rights in Article III of that treaty reads as follows:

> Article III. And provided, That if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; *as also the right, in common with citizens of the United States, to travel upon all public highways.*

A-133, Pet. No. 78-119. (Emphasis supplied.)

If the phrase "in common with," as applied to "the right * * * to travel upon all public highways" means what the District Court says it means in connection with fishing, the Yakima Nation may at this day possess by virtue of its treaty rights the prerogative to exclude the nontreaty citizens of Washington from using one-half of the public highways in the state. Such an interpretation would be absurd as well as erroneous; it is not the less erroneous when applied to the right to fish.

Finally, it should not be supposed that, in securing to the Indians both the public right of common fishery and the easement right to locate at customary places while fishing, the treaty commissioners were affording "no rights (to the Indians) but such as they would have without the treaty." *United States v. Winans, supra,* at 380. At the time of the execution and negotiation of the Stevens treaties, there was no Fourteenth Amendment to the Constitution, and many persons residing in the United States did not enjoy the rights and privileges of citizenship. *Cf., Scott v. Sandford,* 19 Howard 393 (1857). The Indians of Washington Territory, not then being citizens of the Territory or the United States, would have been subject to discriminatory legislation completely excluding them from the off-reservation fishery, even where that fishery was a "common fishery," were it not for the protections of the treaties.[11]

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[11]Certain states had attempted to confine their common fisheries to their own citizens. The New Jersey law involved in *Corfield v. Coryell,*

At least in the matter of the fishery, the treaty provision elevated the Indians to the rights and privileges of citizenship. This Court recognized as much in *Puyallup Tribe v. Department of Game, (Puyallup I)*, 391 U.S. 392, 402 (1968), when it noted "the issue of equal protection implicit in the phrase 'in common with' "; and this notion was implicit in the Court's sustaining of state jurisdiction over individual Indian fishermen in *Puyallup Tribe v. Department of Game, (Puyallup III)*, 433 U.S. 165, 171 (1977).

The Indians' easement rights at their usual and accustomed fishing grounds, unique to them and deriving from their historical use of these locations prior to the time of the treaties which secured them, are therefore no greater than the easement rights that any landowner may reserve in land which he sells. The Indians' common right to engage in fishing at these locations is likewise no greater than the rights of each individual citizen in a fishery for the benefit of all.

(c) Subsequent Interpretations of the Treaty Provisions.

The understanding of the Indian treaty right as the guarantee of the right of equal access to the public fishery and the provision of an easement over private property to secure that access, accords with the pronouncements of this Court through a line of decisions extending back to the beginning of this century. In its more recent decisions, however, this Court has usually focused upon the Indian treaty right in the context of state regulations for conservation. See, e.g., *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game (Puyallup*

Fed. Cases No. 3,320 (1825), is an example; and the Maryland law involved in *Smith v. Maryland*, 59 U.S. 71 (1855), appears to be another example. Indeed, such attempts persist, as shown by the Virginia statute involved in *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977). Such exclusionary laws were under vigorous attack prior to the time of the treaty negotiations, but the attacks were not successful. See *Smith v. Maryland, supra* at 75, and *Corfield v. Coryell, supra*.

I), 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977); cf., *Antoine v. Washington*, 420 U.S. 194 (1975).

Of necessity, the Court's attention in these more recent cases has been drawn to the limitations upon the state police power to regulate the fishery, as opposed to the nature and extent of the Indian treaty right. As a result, the Court's later descriptions of the right have been couched more in negative than in positive items: the exercise of the federal right cannot be conditioned on the payment of a state general revenue tax, *Tulee v. Washington, supra;* and it cannot be regulated unnecessarily or in a manner that discriminates against the Indians, *Puyallup I, supra; Puyallup II, supra; Puyallup III, supra.* But in the earlier part of this century, when private rights, as opposed to state regulatory authority, were interposed against the fishing activities of the Indians, this Court had two occasions on which to discuss the nature and scope of the Indian treaty right.

In the first, and principal, of these, *United States v. Winans, supra*, this Court indicated that the Indian off-reservation fishing right was by nature an interest in real property that protected against the forced exclusion of treaty Indians from the fishery. In its opinion, the Court resolved the treaty fishing right into two components: a "mere right" of taking fish, "not exclusive to the Indians," *id.*, at 381, later described as "the common right," *id.*, at 382; and a "special provision of means for [the] exercise" of the common right, *id.*, at 382. That this "special provision" is defined by nature and extent as a right in land, not a right in fish, is evident from the Court's further elaboration. This Court alternatively characterized the "special provision" as "a right in the land — the right of crossing it to the river — the right to occupy it to the extent and for the purpose mentioned," *id.*, at 381; as a "servitude upon every piece of land as though described therein," *id.*, and as a right that does not preempt reasonable state regulation, but "only fixes in the land

such easements as enable the [common] right to be exercised." *Id.*, at 384. The real property nature of the "special" Indian right is also evidenced by its relation to the claims of the respondent in that case: the right prevailed over an assertion by riparian property owners of "the power to exclude the Indians from the river by reason of ownership" of the adjoining land and shoreline, *id.* at 379; and also over a claim of entitlement to use "a device which gives * * * exclusive possession of the fishing places * * *." *Id.*, at 382.

Particularly worthy of note in the case of *Winans* is the Solicitor General's characterization of the Indian off-reservation fishing right. In his brief to this Court, the Solicitor expressly disclaimed that the Indian treaty right authorized the shutting down of non-Indian fishing activities at such customary locations:

> It will not be forgotten that the Indians are not claiming exclusive rights; but only rights in common with others; it is the defendants who are claiming exclusive rights. There is a *common right of fishing*, but no right in anyone to monopolize.

(Solicitor's Brief *Winans supra* at 16) (Emphasis supplied)

In the same brief, the Solicitor argued to this Court:

> "by the treaty the United States * * * reserved or granted to the Indians, under the guarantee of the national responsibility and honor * * * an exclusive right of fishery in the reservation streams, [and] a *common right of fishery* at all usual and accustomed places * * *

Id. at 27. (Emphasis supplied.)[32]

[32]In the same paragraph, the Solicitor General refers to the treaty fishing right as "the common of fishery," but from his subsequent definition of this term as a non-exclusive right, it is evident that the Solicitor General used the terms "common right of fishing" and "common of fishery" interchangeably in referring to the public right. See n. 28, *infra*.

The Solicitor's characterization of the off-reservation Indian fishing right as the "common right of fishery" is fraught with significance. Viewed in the context of the common law of fishery (see discussion *infra*, pp. 49-53), the right which the Solicitor General effectively vindicated on behalf of the Indians in *Winans* was the right public and common to every person," 3 Kent, *Commentaries, supra*, at 413, the right to be free from exclusion from the fishery at the location of their customary fishing sites.

On the other occasion in which this Court had the opportunity to discuss the nature of the Indian treaty right, *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919), the Court's description of the off-reservation right also makes clear that it consisted of a right in land, an easement, and not a property interest in the fish themselves. In contrasting the claims indicated in *Winans*, with those before it in *Seufert*, the Court observed:

> The right claimed by the Indians in that case was to fishing privileges *on the north part and bank of the Columbia river*,---in this case similar rights are claimed *on the south part and bank of the river.* * * * [and] that their understanding of the treaty was that they had the right to resort to *these fishing grounds* and make use of them in common with other citizens of the United States.

Id., at 198-199 (Emphasis supplied.)

Finally, in delineating the nature of similarly-phrased treaty rights enjoyed by certain New York Indians in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916), this Court again reaffirmed the essentially territorial character of reserved common fishing rights. The non-exclusive right to hunt and fish in ceded lands was there described as "an easement, or profit á *prendre*;" a "privilege", "reserved" "as against their [the Indians] grantees and all who might become owners of "the ceded lands."; and a "right of private property" that could ground a claim of "injurious discrimination." *Id.*, at 562. That right did not contemplate any restriction on its common exercise by non-Indians, save for the good of all for conservation purposes; the Court noting that:

> Those to whom the lands were ceded, *and their grantees, and all persons to whom the privilege might be given,* would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe.

(*Id.*, at 562, emphasis supplied)

While this Court has defined the Indian off-reservation fishing right in terms that do not allow for an allocation of the fishery between treaty and non-treaty fishermen, it has recognized that the proper exercise of the state's conservation power, a matter not envisioned by the treatymakers, may in certain unique circumstances require an allocation of the fishery. In *Puyallup II, supra,* this Court invalidated a state regulatory regime that discriminated against Indian fishing by entirely pre-empting their commercial net fishery on steelhead. In *Puyallup III, supra,* the Court approved the state court's selection of an allocation formula to effectuate the "accommodat(ion)" required by the Court in *Puyallup II, supra,* at 49.

It is important to recognize, however, that the allocation solution approved by the Court in *Puyallup III* was necessary and appropriate only because the state could not effectively conserve the steelhead resource in a non-discriminatory fashion without such an allocation.

The steelhead fishery involved in the *Puyallup* cases consisted of a highly "efficient"[33] commercial net fishery by Puyallup Indians in the same "usual and accustomed" areas that had traditionally supported a relatively "inefficient" hook-and-line sport fishery. If left unregulated, the Indian commercial fishery would have entirely pre-empted the sport fishery by non-Indians on the Puyallup River, and perhaps have destroyed the entire run of steelhead. See, *Puyallup III, supra,* at 176-77. The state's prohibition of the Indian net fishery, however, would have likewise allowed a preemption of the steelhead fishery by non-Indians. See *Puyallup II, supra* at 48-49.

[33]"Efficient" is here used in the sense of number of fish caught per unit fishing time per person.

An allocation between the two fisheries was therefore necessary to avert a preemption by either one.[34]

The salmon fishery by treaty Indians and nontreaty fishermen at issue in this case, however, is in marked contrast to the steelhead fisheries involved in the *Puyallup* cases. As between treaty Indians and all other citizens, the use of the salmon resource is the same: members of both groups engage in a commercial net fishery of the salmon and take advantage of an equal opportunity to participate in the commercial and sport fisheries occurring at all locations — ocean, inland marine waters, and rivers. In light of that equal opportunity, there is no danger that one group will preempt another in the salmon fishery harvest. Thus, since state conservation regulations applied to all fishermen are inherently nondiscriminatory, there is no necessity for an allocation between different fisheries.

(d) **Summary.**

Against the background of the treaty negotiations, the historical and legal milieu in which the treaties were conceived, and the undeviating opinions of this Court, the radical and unjust restructuring of rights effected by the District Court becomes all too evident.

The District Court's orders have transmitted the Indians treaty-guaranteed servitude upon a real property, *United States v. Winans, supra,* into a servitude upon fish. Fifty percent-plus of the number of salmon and steelhead annually returning to spawn in Washington's rivers and streams are now impressed with an encumbrance in favor of treaty fishermen. As to such fish, treaty tribes are given the right to restrain the "trespass" of non-treaty fishermen upon them, even though that "trespass" may occur tens or hundreds of miles beyond the usual and accustomed fishing grounds of a particular tribe.

[34]The language "entirely preempted by non-Indians" is that used by Justice Douglas in his opinion for the court in *Puyallup II, supra,* at 48. Actually, non-Indians did not entirely preempt the sport fishery on steelhead; Indians as well engaged in such a sport fishery.

It is difficult to imagine a more thorough reversal of the territorially-confined right of fishing originally incorporated into the Stevens treaties, or one more inconsistent with Governor Stevens' exhortation to the Indians "but that the whites should fish also." Joint App. at 331.

Moreover, by allocating the fishery between treaty Indians and other citizens, the District Court has destroyed the common fishery envisioned by the treaty provisions, thereby denying to non-treaty citizens the right of fishing that is "public and common to every person." 3 Kent, *Commentaries, supra* at 412. If there were a common fishery in Washington waters, as there was prior to the decision of the District Court in this case, both treaty and non-treaty fishermen would have the opportunity to fish for 100% of the harvestable resource, although the activities of each and the vagaries of nature would preclude either group from taking more than a fractional share of the harvestable fish. The actual apportionment of the harvest would be determined by the amount of time, effort and resources invested by each individual fisherman, and of course, that ever present factor, luck. Under the current court-ordered system, however, nontreaty fishermen are prohibited from fishing upon more than 50% of the available resource. There is now only a true common fishery for treaty Indians and all other citizens as to one-half of the salmon and steelhead fishery.[35] The other half is an exclusive franchise for the benefit of the 800 or so treaty fishermen. These fishermen have been insulated from the laws of the marketplace: each can expend only a fraction of the effort that the non-treaty fisherman invests and yet reap a harvest that is many times over that of the average non-treaty fisherman.

The injustice of such a franchise has long been recognized by the legal tradition which we share. As Chancellor Kent observed in his famous *Commentaries*, Volume III, *supra*, an exclusive right of fishing in the

[35]Under the District Court orders, treaty Indian catches occurring outside of the "usual and accustomed" areas are included within the nontreaty citizens' 50% share. See discussion at pp. 7, 78-82, *infra*.

public waterways "was so unreasonable, as to be prohibited in future by the Magna Carta." *Id.*, at 409, 410, n. *c*. It is no less unreasonable or unjust to the non-treaty fisherman who has been ordered by the District Court to refrain from fishing while his treaty Indian neighbor continues to fish.

B. INTERNATIONAL PACIFIC SALMON FISHERIES COMMISSION

1. Introduction.

At issue is the propriety of the District Court's extension of the 50% allocation to fisheries which are subject to the jurisdiction of the International Pacific Salmon Fisheries Commission. The extension was implemented in 1975 through orders requiring Fisheries to allow special Indian fisheries in violation of then-existing IPSFC regulations. Fisheries by Indians on IPSFC stocks are now permitted at times and in manner prohibited by IPSFC regulations. Indian fisheries in IPSFC waters are also permitted in the face of total closures if large mesh nets are used.

These orders are in direct opposition to the District Court's original holding in 1974 that:

> * * * This court believes that treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the commission.

United States v. Washington, supra, 384 F.Supp. at 411. (Joint App. 214).

These orders also directly contradict the affirmance of that original decision by the Ninth Circuit, which declared:

> Congress sufficiently indicated its intent that all persons, including Indians, be subject to commission regulations.

United States v. Washington, supra, 520 F.2d at 690. (Joint App. 54).

The advent of these orders, adopted in response to motions of the United States and various tribes, also

marks a direct reversal of the position that the United States has taken before this Court. In opposing the state's petition for certiorari in Pet. No. 75-588, the United States gave the following assurances to this court:

> The decision below presents no issue regarding that [IPFSC] Convention requiring further review. Both the district court (384 F.Supp. at 411) and the court of appeals (Pet. App. 49-50) specifically held that all persons, including treaty-protected Indians, are subject to the regulations of the IPSFC. Thus there is no question of the decree impinging upon the authority of the IPSFC.
>
> * * * As we have demonstrated, both courts below specifically recognize the supremacy of IPSFC regulations. If any subsequent actions interfere with the regulations of the commission, they are not sanctioned by the decision under review.

Brief of United States in Opposition Pet. No. 75-588, pp. 21-22.

Immediately after the District Court's entry of the orders extending the 50% treaty Indian allocation of the fishery to IPSFC waters in 1975, the state filed its notice of appeal to the Ninth Circuit. The case was not heard until 1978.

2. **This Case Is Not Moot.**

The Court of Appeals refused to review the merits of the District Court's orders respecting the IPSFC. At the behest of the United States, the Ninth Circuit dismissed the IPSFC case as moot, holding:

> The 1975 season has now passed and neither the order of the United States District Court nor that of the state court has current force.

United States v. Washington, 583 F.2d, at 1121. (1978) (A-32, Pet. No. 78-119).

However, the actions of the District Court and the United States government, commencing with the court's orders in 1975 and continuing up to the present day, belie the contentions of the United States and the holding of the Ninth Circuit that the issue is moot.

The District Court's orders of 1975 are still in effect and have been implemented for every fishing season since their entry. The injunction allowing Indians to use large mesh nets in IPSFC waters when waters are closed by Commission regulation (A-125, Pet. No. 78-119) has been implemented in each subsequent season. More importantly, the court's Conclusions of Law (CL 56-59, A-114-15 Pet. No. 78-119) that the 50%-plus allocation applies to the IPSFC fisheries also remains in effect though it has been inplemented in varying ways in subsequent seasons. In 1976 the court ordered the United States and the state Fisheries Department to provide special fisheries for Indians in IPSFC waters. This was specifically based upon the 1975 orders and its Conclusions of Law that Indians are entitled to 50% of the United States' catch in IPSFC waters. (Joint App. 461 et seq.)

In its dealings with the Canadian government and the IPSFC in particular, the United States continues to take the position that it is bound by the District Court's orders to provide for an allocation of the United States fishery in IPSFC waters to the treaty Indians. The government provided directives to its representatives on the IPSFC, including the director of Washington's Fisheries Department, as follows:

> * * * with the aim of accommodating the *United States v. Washington* decision regarding Indian treaty rights * * * you are instructed to support it at the next commission meeting and vote for its adoption.

App. Pet. No. 78-119, pp. 168-169.

In its adoption and promulgation of regulations for the IPSFC fishery, the Departments of Interior (adopting treaty Indian regulations) and Commerce (all citizen regulations) have continued to provide special Indian fisheries under regulations not consistent with those passed by the IPSFC. In proposing these regulations, the Department of Interior expressly noted in the Federal Register that the regulations were to be adopted in order

> to implement treaty rights "affirmed in *United States v. Washington*."

25 CFR 256(b) (Federal Register, Volume 43 No. 122, Friday, June 23, 1978.)

Those special regulations for treaty Indians were challenged. A District Court decision upholding them was appealed to the Ninth Circuit. Recognizing the continuing nature of the controversy involved the Ninth Circuit in its most recent decision in this matter retreated from its former determination that the District Court's 1975 orders regarding the IPSFC fisheries were moot observing:

> Despite the procedural cloth in which this proceeding is garbed, the real attack is upon the decree in *United States v. Washington, supra.* The interpretation and effect of the decree in *United States v. Washington* are issues which are presently pending before the United States Supreme Court.*

Under these circumstances it would be in appropriate for us to further pursue the issues.
Purse Seine Vessel Owners Assn. v. United States Dept. of State (9th Cir. No. 77-2968, filed October 26, 1978).[38]

The District Court's 1975 orders have continuing validity in two other senses. Its decree provides:

> * * * defendants must, * * * afford treaty Indians an opportunity to take an equal share of the total number of harvestable fish, which, absent the fishing activities of other citizens, would be available for harvest at their usual and accustomed fishing grounds within Washington waters, *or must otherwise equitably adjust the treaty Indians' share of other species or in other areas to compensate them for disproportionate numbers of fish taken by other Washington citizens under the regulations issued by said [IPSFC] commission.*

App. Pet. No. 78-119, A-117, Fourth Supp. Findings of Fact, Conclusions of Law and Decree, 1975 Frazier River

"*Washington v. United States [No. 78-119] cert. granted (1978) ___ U.S. ___; Puget Sound Gillnetters Assoc. v. U.S.D.C. [No. 78-130] cert. granted (1978) ___ U.S. ___; consolidated with Washington v. Washington State Commercial Passenger Fishing Vessel Assoc. (1978) ___ U.S. ___."

[38]The United States brief in response to Petition No. 78-119 and 78-139 referred to the pendency of this action at pa. 18, fn. 15.

and Sockeye Pink Salmon Harvest (A-105 Pet. No. 78-119) (Emphasis supplied)

As yet, the District Court has not effected such an "equitable adjustment" for non-treaty fishermen catches in IPSFC waters. However, it has made equitable adjustment for non-treaty catches occurring in other waters "outside the jurisdiction of the state of Washington," *i.e.*, in the ocean waters beyond the state's three-mile limit, now under federal jurisdiction (16 U.S.C. §§ 1801, *et seq.*). Nontreaty fishermen and the state therefore continue under the liability that such adjustments will be made. This continuing "liability" for equitable adjustments when Indians catch less than their 50% allocation within the IPSFC waters makes clear that the District Court's determination that the 50%-plus allocation applies to those waters is not a moot question.

The court's decree also enjoined Fisheries "from allowing any fishing * * * by persons not entitled to exercise Indian treaty rights * * * until Fisheries adopts and files with this Court regulations * * *" to provide treaty Indians an equal share of fish or equitably adjustment as set forth above. Fourth Supp. *supra* at A-117.

As a consequence of the state court decisions (discussed *infra* at 94-99), the Department of Fisheries was unable to provide for such a special Indian fishery in IPSFC waters. Because of the terms of the District Court's injunction conditioning state authorization of nontreaty fishing upon the provision of a special Indian fishery in IPSFC waters, the state was forced to abandon its congressionally-authorized and historical role as the enforcement agency for IPSFC regulations. (16 USC § 776(d), RCW 75.40.060, A-159-60, 167 Pet. No. 78-119).

3. The District Court Orders Requiring Special Indian Fisheries Which Are Incompatible With IPSFC Regulations Are Unlawful.

The 1937 Convention[37] with Canada specifically requires that both nations ensure compliance with Commission regulations by all of their citizens.[38] In order to execute this Convention and implement the commitment of the United States to subject all of its citizen fishermen to the regulations of the IPSFC, Congress enacted 61 Stat. 511 (July 29, 1947),[39] P.L. 80-255, which provides:

[37]The Convention was signed in 1930 but was not ratified until 1937. See: A-135, Pet. No. 78-119.

[38]Each High Contracting Party shall be responsible for the enforcement of the orders and regulations adopted by the Commission under the authority of this Convention, in the portion of its waters covered by the Convention. Art. VIII, *supra* A-145, Pet. No. 78-119. Also see, Art. IX, *supra*, at A-145, referring to "Every national or inhabitant, * * *" and Art. X, *supra*, at A-146.

[39]The ten year interval between the 1937 ratification of the Convention with Canada and the enactment of this legislation is due to the provision in the 1937 Convention (A-148, Pet. No. 78-119) that the Commission could not promulgate or enforce regulations until studies had been completed on two cycles of sockeye. On the day the United States Senate completed legislative approval of the bill, the following statement was made on the Senate floor.

> MR. MAGNUSON. Mr. President, by way of explanation, the reason for my request at this time is that this is an emergency measure. The fishing fleets are ready to sail on Monday. This convention must be ratified by the Congress. Under the United States and Canadian salmon fisheries treaty each nation pledges itself to enact enabling legislation. Canada has done so through her Parliament. The House of Representatives has passed the bill unanimously, without a dissenting vote.
>
> This treaty has been the subject of many conferences and negotiations. The Fraser River lies wholly within the Dominion of Canada, but the mouth of the river is about 5 miles north of our nothern border, and all the salmon are caught in international waters in Puget Sound, between Canada and the United States. Because of the fact that the fleets are ready to start the first of the week, I hope the Senate will see fit to follow the House action and the action of the Canadian Parliament in ratifying this convention. Congressional Record Vol. 93, p. 9167 (July 17, 1947).

> "It shall be unlawful for any person to engage in fishing for sockeye salmon [or pink salmon][40]in convention waters in violation of the Convention or this chapter or of any regulation of the Commission."

Codified as 16 U.S.C. § 776 (2).

Originally, the District Court and the Ninth Circuit recognized that the Convention and executing statute required that "all" United States citizens, treaty Indians included, be bound by IPSFC regulations. The District Court noted in its original decision:

> * * * treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission must comply with regulations of the Commission.

(*United States v. Washington*, 384 F.Supp. *supra*, at 411, Joint App. 214.)

The Ninth Circuit observed that Congress intended that all fishermen were to be subject to IPSFC jurisdiction by its statement:

> Congress sufficiently indicated its intent that all persons, including Indians, be subject to Commission regulation.

(*United States v. Washington*, 520 F.2d 676 (1975) at 690, Joint App. 54.)

In originally recognizing the supremacy of the IPSFC regulations, the District Court was aware that those regulations for sockeye and pink salmon would have

> * * * a coincidental effect on the taking of coho, chum, and chinook salmon which are present during the times of such regulations are in force.

(*U.S. v. Washington*, 384 Fed. Supp., *supra*, at 392, FF 214, Joint App. 178.)

During the first fishing season after that decision, Indians complied with the IPSFC regulations.

Shortly after the Ninth Circuit affirmed the District Court (June 4, 1975), the district court reversed its earlier

[40]Pink salmon were included by amendment in 1957. P.L. 85-102, 71 Stat. 294.

ruling that IPSFC regulations apply to all fishermen including treaty Indians. On June 10, 1975, the United States and some tribes asked that Fisheries be ordered to either set special fisheries for Indians in IPSFC waters or refrain from authorizing any fishing in IPSFC waters. The first such injunction was issued on June 26, 1975.

In July, 1975, in response to a motion by the Swinomish Tribe, the court enjoined the application of the IPSFC regulations which were then enforced by the state pursuant to RCW 75.40.060. Also see 16 U.S.C. § 776(d). This court order permitted the tribe to fish for chinook salmon in areas and at times that the IPSFC prohibited fishing. The fishing was permitted by the court provided the Indians used a larger mesh net than normally used for sockeye and pink salmon. (See Order of August 3, 1975, A-125, Pet. No. 78-119). That order was entered despite the uniform testimony that such a Swinomish net fishery would take sockeye and pink salmon which are under IPSFC jurisdiction and that Indian fishermen who had already commenced such fishing had been catching sockeye. (See testimony of treaty fishermen, TR 89 and 99 of August 6, 1975; patrol officer, TR 105, *supra*, and a biologist, TR 114, *supra*).

4. The Court Does Not Have Jurisdiction to Interfere With an International Commission.

The IPSFC is an international commission created by treaty negotiated by the Executive and ratified by the Senate. Three of the six members are appointed by the President and the other three by Canada. The international character of the Commission and its members renders it unamenable to the jurisdiction of the District Court. Indeed, an assertion by the court of jurisdiction over Commission actions, encompassing within it a claim of authority over the actions of the Canadian commissioners, would be tantamount to an assertion of jurisdiction over the executive branch of the Canadian government.

Nevertheless, the District Court attempted to assert such jurisdiction by consciously interfering in the decision-making process of the Commission. The court included several stays of its orders specifically to allow time for United States representatives on the Commission to persuade the Commission to change its regulations. The court directed the Director of Fisheries, in his capacity as an International Commissioner, to "promptly take actions, whatever seems appropriate in the occasion, to press the matter before the Commission." (TR 144, July 11, 1975, quoting the judge.)

Similarly, the court, when ordering that the Swinomish tribe be allowed to disregard Commission closures, as implemented by state regulations, delayed the entry of the order so the state could ask the IPSFC to permit such a fishery (TR 130, 133-34, August 6, 1975). After the IPSFC refused, the court entered its order (A-125-27, Pet. No. 78-119).

As previously noted, implementation of the District Court orders has influenced the United States to direct its commissioners to vote as they (the United States) believe is required by the court's orders.[41] Such interference with the conduct of foreign affairs is a wholly inappropriate function for any federal court.

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[41]The Ninth Circuit in another action involving the IPSFC fishery, *Purse Seine Vessel Owners Assn. v. United States Dept. of State*, *supra*, at p. 5, stated:

> The regulatory scheme promulgated by the Interior Department was expected to provide the treaty Indians with an opportunity to catch about 10 to 15 percent of the catch available to the United States. Evidence introduced at the time of the hearing on the preliminary injunction indicated that the treaty Indians were able to catch about 20 percent of the American share.

The court's statement makes clear that although the United States has consistently taken the position that the state Department of Fisheries is obligated to fully implement the 50%-plus allocation, other United States agencies have moved to implement less than 50% when they exercise jurisdiction over the fishery.

See *infra*., p. 93, where it is noted that the same inconsistency has occurred in the ocean fishery under United States jurisdiction.

In *Z & F Assets Realization Corp. v. Hull*, 311 U.S. 470 (1941), this Court was faced with a similar indirect attempt by a federal court to interfere with an international commission created by a treaty between the United States and Germany to rule on war claims by American citizens. In concluding that an indirect challenge to the Commission's determination could not be entertained by the court, the following statement was made:

> And the fact that petitions sought to challenge the Commission's power by proceedings against the Secretaries of State and the Treasury, and not by direct suit against the Commission, is immaterial. If petitioners cannot directly attack the Commission in the courts, neither can they, in the absence of congressional consent, assail the propriety of its awards through the expedient of suits against others charged with responsibility for executing the final determination of the Commission.

(*Supra*, at 491.)

The challenge there in question would not have required the commission to change its orders, though it would have frustrated their implementation. Here the court was attempting to force the international commission to change its orders.

In the present case, the District Court's interference with an international commission is more flagrant. Its actions have drawn a rebuke by the International Commission which filed two protests with the United States Secretary of State in 1975. (Ex. JX 10 and 11, Joint App. 547.) Others have been filed including as recently as July, 1978 (Supp. App. B-1, B-2, Pet. 78-119) A letter of objection was sent by the government of Canada to the government of the United States. Although the United States agreed that this letter would be provided as an exhibit, TR 10-11, August 6, 1975, it has not done so.

Although the government provides a special Indian fishery through its ocean fishery regulations, there is no attempt by the United States to provide any specific share to Indians in the ocean fisheries. Yet, fish caught in that area under federal jurisdiction are counted by the court against the "inside" nontreaty fishermen's share per the "equitable adjustment" (discussed *infra*, 7, 78-82).

The extent of the District Court's "intrigue" in international affairs is further evident in its manipulation of the terms of its orders. A state department official advised the court by affidavit that the State Department has declined to implement one portion of the court's order:

> No action was taken * * * with regard to the further provision pertaining to a five day fishery, since the Department of State concluded that provision was contrary to the United States obligation and policies under the Salmon Convention in that it was inconsistent with the basic regulatory scheme elaborated by the Commission.

(Record in 9th C.A. No. 75-2835, 76-1092, p. 160). The court then amended the injunction to delete the five-day fishery.

The continuing international ramifications of the District Court's actions are also documented in the record. Donald L. McKernan, who as Chief Negotiator headed the United States' delegation in bilateral negotiations with Canada, testified to the possible disruption of the regulatory system of the IPSFC by the court's actions. (TR 136, July 11, 1975.) When asked whether a disruption of the IPSFC regulatory system could cause problems in the international negotiations with Canada (which encompass all shared fisheries, not just those under the IPSFC), his answer was "yes." (TR 137, July 11, 1975). See also the 1978 protest of the International Commission communicated to the United States, reprinted (App. B-1, Supp. Pet. No. 78-119), and the IPSFC communication to Canada on the same subject (App. B-2, Supp. Pet. No. 78-119).

5. The Convention (50 Stat. 1355) and Congressional Act Providing for Enforcement of IPSFC Regulations (16 U.S.C. 776) Supersede Any Indian Treaty Rights Which Might Have Existed in Waters Now Under IPSFC Jurisdiction.

At the outset, it should be noted that if this Court accepts the argument we have urged above (see discussion

at pp. 38-63, *infra*) that the Indians' "in-common with" right preserved a special easement over property and a guarantee of the same rights as all other citizens, the question of whether the Convention and implementing statutes supersede Indian treaty fishing rights need not be addressed.

That Indians were fully subject to IPSFC regulation has been the historical understanding of the parties to the IPSFC treaty, the United States and Canada. It also remains the understanding of the IPSFC itself (note the continuing protests of the Commission to special Indian regulations).

The courts below should have deferred to, or at least considered, the opinion of the administrative agency, the IPSFC, to which implementation of the Convention was delegated by the two nations pursuant to the Commission. *Udall v. Tallman*, 380 U.S. 1 (1965); *Immigration Service v. Stanisk*, 395 U.S. 62 (1969). While it may be argued that deference to administrative construction is a domestic law concept and should not here be invoked, we submit that reasons for such deference are compelling in the present circumstances. The usual reason for a court's deferring to an interpretation by an administrative body is that such an agency is familiar with its mandate and the mechanisms necessary to implement it. This principle is clearly applicable in the case of the IPSFC and requires that a court should honor the IPSFC's construction of its mandate. That construction holds that the IPSFC has the responsibility to establish a uniform management system for the protection and harvest of the resource without reference to ancestral characteristics of fishermen.

If the Court concludes that the Indian treaty language created a special right to an allocation, then the superseding effect of the subsequent Convention and statute must be considered. That Congress has the plenary authority to amend or abrogate Indian treaty rights by subsequent legislation is well established. *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-67 (1903); *cf. Chae*

Chan Ping v. United States, 130 U.S. 581, 606 (1889). While courts will not imply abrogation of treaty rights by subsequent legislation that can be fairly construed to allow their continued exercise,[42] their exercise must be compatible with the requirements of the subsequent legislation.

The Court need not find an express abrogation to conclude the Indians must comply with IPSFC regulations. Indeed, such evidence as expressions of Congressional intent to abrogate special Indian treaty rights in IPSFC waters would not be expected since such special rights did not exist until created by the District Court in 1975.[43] The questions are two; the effect of the Convention and the effect of the statute implementing it.

The rules for determining the effect of either a subsequent treaty or statute upon a prior treaty are the same; if inconsistent the later treaty *or* statute will control:

> By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

Whitney v. Robertson, 124 U.S. 190, 194, 31 L. Ed. 386, 8 S. Ct. 456 (1888); see also, *Kansas, Missouri & Topeka Ry. v. Roberts*, 152 U.S. 114 (1894).

This Court has on a number of occasions considered conflicts between statutes and treaties.

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[42] *Menominee Tribe v. United States, supra; Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934).

[43] One exception: Under this Court's decision in *Tulee v. Washington* 314 U.S. 681 (1942), Indians fishing in IPSFC waters prior to 1975 did not purchase licenses. As the Commission has never engaged in licensing, leaving that to Canada and the State of Washington, there were no special rights vis-a-vis the IPSFC.

In *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870), this Court considered the applicability of a tax law for tobacco produced "within the exterior boundaries of the United States." *Id.* at 618. The question was whether a prior Indian treaty which provided for payment of tax "*only*" where a sale occurs "outside of the Indian territory" precluded the collection of the tobacco tax. This Court held that the act and the treaty were inconsistent since the Indian territory was within the exterior boundaries of the United States, and that the legislation being the later in time governed. In upholding the tobacco tax within Indian territory this Court stated:

> A treaty may supersede a prior Act of Congress (*Foster v. Neilson*, 2 Pet., 314) and an Act of Congress may supersede a prior treaty.

Taylor v. Morton, 2 Curt., 454. *The Clinton Bridge*, 1 Walw., 155. *Cherokee supra*, at 621.

> Congress not having thought proper to exclude them, it is not for this court to make the exception. If the exemption had been intended it would doubtless have been expressed. There being no ambiguity, there is no room for construction. It would be out of place. *U.S. v. Wiltberger*, 5 Wheat., 95. The section must be held to mean what the language imports. When a statute is clear and imperative, reasoning *ab inconvenienti* is of no avail. It is the duty of courts to execute it. *Morehouse v. Rennell*, 1 Clark & F., 327; *Wolff v. Koppel*, 2 Den., 372.

Id. at 620.

Subsequently, in *Edye v. Robertson*, 112 U.S. 580 (1884), the relationship between a statutory tax for "each and every passenger, not a citizen of the United States, who shall come * * * to any port within the United States" *supra* at 589-90, and a prior treaty was considered. The treaty provided that the United States would not impose any greater duty on friendly aliens than on citizens. This Court, in recognizing the conflict held that the statute was applicable, stated:

> A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the mattter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate.

Id. at 599. Also see *Whitney v. Robertson, supra; Chae Chan Ping v. United States, supra;* and *Pigeon River Improv. Slide & Boom Co. v. Charles W. Cox Ltd.*, 291 U.S. 138 (1934).

Under the principles of construction enumerated in each of the above holdings of this Court, the conclusion must be that the IPSFC and implementing statute supersede any special Indian treaty rights found to have been created by the off-reservation fishing provision.

The IPSFC Convention providing that "taking * * * salmon in violation of an order of the Commission shall be prohibited" (convention, *supra*, Art. IV, A-142, Pet. No. 78-119) and implementing statute "it shall be unlawful for any person to engage in fishing * * * in violation * * * of any regulation of the Commission" (16 U.S.C. 776(a)(a), A-160, Pet. No. 78-119), are clear and unambiguous. These provisions are in clear conflict with the District Court's construction of the earlier treaties with the Indians to provide an exemption for such Indians.

As this Court declared in *Pigeon River, supra*, in the event of any ambiquity, the Court should "* * * look to the practical construction which has been placed upon it." *Id.* at 158. Until the District Court's orders, the IPSFC regulations were regarded to be binding on all citizens, including treaty Indians. Even if the language of the Indian treaties were ambiguous, the practical construction which has beenplaced upon them since the Convention, and the opinion of the administrative agency charged with implementing the Convention, should be given deference by the Court. Under either test the result is that Indians are fully subject to IPSFC regulation; any special right has been superseded.

Finally, as this Court stated in *Cherokee, supra,* at 228;

> "Congress not having thought proper to exclude them, it is not for this court to make the exception."

Congress could have made an exception for treaty Indians in ratifying the Convention or passing the implementing statute. It is not for the District Court to do so. When Congress has in the past sought to provide such an exemption for Indians, it has done so explicitly. For example, in the Marine Mammals Protection Act, 16 U.S.C. § 1361, et seq., an exemption is specifically provided:

> The provisions of this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Artic Ocean if such taking * * *

16 U.S.C. § 1371 (b); also see, the Protection of Bald and Gold Eagle Act 16 U.S.C. § 668(2).

No such exception having here been made, the subsequent treaty and statute control. Any special right has been superseded.

6. Establishing a Special Treaty Indian Share in the IPSFC Waters or Providing For an Equitable Adjustment Is Not Appropriate and Constitutes An Abuse of Discretion.

The Ninth Circuit in its 1975 affirmance of the District Court's original orders, *United States v. Washington, supra,* considered the IPSFC fishery in the context of a section entitled "Equitable Adjustment." 520 F.2d *supra* at 688-91, Joint App. 52-54. The District Court's IPSFC orders provide that the court may require an "equitable adjustment", thereby increasing the Indian fish share in other areas to reflect the harvest by other citizens in the IPSFC fishery. The facts of the Fraser River fishery do not support such an adjustment.

We have previously indicated that nature of this "equitable adjustment" concept, *infra*, at 78. According to

the Court the basis for equitable adjustments is that:

> Parties to the treaty did not anticipate shortages of harvestable fish; they did not foresee that downstream fishing by non-Indians would some day injure the Indians' right to fish at their usual places.

United States v. Washington (9th Cir. 1975), *supra,* at 689.

The Ninth Circuit went on to suggest, but not mandate, a remedy for situations when downstream fishing by Washington fishermen take fish before they reach the tribe's usual and accustomed grounds:

> The court may therefore adjust equitably the treaty Indians' share to compensate them for fish taken by other Washington citizens under regulations issued by the International Pacific Salmon Fisheries Commission which would otherwise be available for harvest at their traditional treaty areas. The court may so adjust the tribes' allocation to compensate, of course, only those tribes which share in the harvest of Fraser River salmon. * * *

Id. at 690.

Thus, the propriety of an equitable adjustment must be founded upon a determination that the tribal opportunity to fish was diminished by the harvest by other Washington citizens before the fish reached the Indians' usual and accustomed grounds and stations. The situation of the IPSFC fishery does not support such a determination, and thus does not qualify for an equitable adjustment.

The fish which are subject to the IPSFC fishery are destined for Canada's Fraser River. These fish are *not* returning to terminal areas in Washington which are usual and accustomed grounds and stations of treaty Indians. When the fish pass through usual and accustomed grounds in Washington territorial waters, they are in areas subject to the IPSFC jurisdiction.

Prior to the annual IPSFC fishery by treaty Indian and all other fishermen, there is only an insignificant American harvest because most of those fish migrate directly from northern Canadian waters into the Strait of

Juan de Fuca. Hence, Washington citizens do not fish upon IPSFC runs before those fish reach waters fished by treaty Indians.

Once the Fraser River fish reach the waters where the bulk of the American fishery occurs, the tribes having usual and accustomed areas within the IPSFC waters have an equal opportunity to fully particpate in the initial harvest of these runs. Indeed, the tribes have the opportunity to fish before most of the Canadian net fishery.

Despite this equal opportunity, treaty fishermen have devoted their fishing efforts to the fisheries outside of IPSFC waters in the seasons of the IPSFC fishery. In 1975, for example, the treaty fishing effort in the IPFSC fishery was less than one-tenth of the nontreaty fishing effort.[44] Necessarily, the relatively low effort by treaty fishermen in the IPSFC fishery renders it impossible for treaty Indians to harvest 50% of the United States' share of the Fraser River salmon runs.

Under the District Court's decrees, however, certain treaty Indians can be "compensated" for the difference between the treaty and nontreaty harvests in the IPSFC fishery, even though that difference did not result from a denial of equal opportunity to treaty fishermen to share in the IPSFC harvest, or an interception of the runs by nontreaty fishermen before the fish runs reached tribal

[44]In its decree of July 16, 1975, the District Court made the following findings of fact concerning the respective fishing efforts of Indian and non-Indian citizens in the IPSFC fishery: (FF 254, 274, A 109, Pet. No. 78-119):

	Indian (Predicted for 1975 season)	**non-Indian 1974 season**
Large gillnets	65	1140
Gillnet Skiff	39	
Purse seine	4	272
Reefnet		54

A representative of the Lummi Tribe testified that, of an approximately 175-200 tribal fishermen and boats, only 50 would participate in the IPSFC fishery in 1975. (Tr. June 26, 1975, pp. 60-71).

"usual and acustomed grounds."[45] The "equitable adjustment" formula incorporated in the court's 1975 order operates without regard to the reasons for the relative higher catch of nontreaty fishermen.

We submit that all of these factors render it highly inequitable for nontreaty fishermen to be subject to any further restrictions upon their opportunity to fish because of the failure of treaty Indians to harvest 50% of the American share of the IPSFC fishery.

C. IF AN ALLOCATION IS EQUITABLY REQUIRED, THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOCATING 50% PLUS OF THE FISHERIES TO INDIAN TREATY FISHERMEN.

1. Introduction.

In an earlier section, *infra*, at 60, we noted that, under special circumstances, the exercise of the state's power to conserve the fishery necessitated an allocation of the fishery between treaty Indians and all other citizens. However, the salmon fishery, unlike the river steelhead fishery in the *Puyallup* cases, is in the marine waters available for both sport and commercial harvest. Therefore, uniformly applied state conservation regulations do not result in a treaty Indian or nontreaty citizen preemption of the fishery. It was the state's attempt to have a preemptive fresh water fishery for steelhead that required an allocation between the two groups in the *Puyallup* cases.

In this section, we assume only for the purpose of argument that the District Court correctly determined that some form of allocation of the fishery resource between treaty Indian and non-treaty fishermen was necessitated. Even if that assumption is made, the District Court abused its discretion — in fact, completely refused

[45]As noted above, the bulk of the United States' fishery in IPSFC waters occurs in areas which are also the "usual and accustomed" fishing grounds of various tribes.

to exercise its discretion and ignored considerations referred to by this Court — in its allocation of a 50% - plus portion of the harvestable fish to treaty Indians.

2. Individual Interests of Fishermen.

From a survey of its original opinion, nothing could be more evident than that the District Court did not exercise any discretion in selecting its allocation formula. The District Court determined, as a matter of law, that the "in common with" language of the Stevens treaties meant that treaty Indians and all other citizens were to "*share equally* the opportunity to take fish," 384 F. Supp. at 343 (Joint App. 89), and its 50-50 allocation formula followed from this determination.

Even the court's special treatment of the Indian ceremonial, subsistence, and on-reservation catches flowed from its determinations of law, and were not, in the court's view, a matter for discretion.[46] The special ceremonial and subsistence fishery was based upon the court's finding of a "special treaty significance distinct from and superior to the taking of fish for commercial purposes." Id., at 343. There is no mention of these fisheries in the treaties. Likewise, the special status for Indian on-reservation catches rested upon the holding that "[a]n *exclusive* right of fishing was reserved to the tribes within the area and boundary waters of the reservation," *Id.*, at 342-43. However, only the Yakima treaty has such a provision.

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[46]The only issue upon which the District Court chose to exercise equitable discretion was in reference to fishing by nontreaty citizens outside of the state's jurisdiction. The court declared that it would make periodic upward adjustments in the treaty fishermen's "50% plus" allocation to:

> compensate treaty tribes for the substantially disproportionate numbers of fish caught by nontreaty fishermen in marine waters closely adjacent to but beyond the territorial waters of the state, or outside the jurisdiction of the state, although within Washington waters.

Id., at 344. (Joint App. 90).

(The latter presumably refers to IPSFC fisheries which occur in Washington waters.)

In its first opinion, the Ninth Circuit affirmed the District Court's exercise of "nondiscretion" in the selection of a 50-50 allocation between treaty Indians and all other citizens. Ironically, the court observed that "the court's apportionment was well within its discretion." 520 F. 2d, *supra* at 688. (Joint App. 53). In the view of the Ninth Circuit, the 50-50 division was "the fundamental principle to be applied in a judicial apportionment of the fish," Id., at 688. This principle was not founded in the present or past equities of the parties but rather form the "formal equality" of the bargaining positions of the United States and each of the tribes at the time of treaties. *Id.* at 688.

In its second opinion, which is the immediate subject of this appeal, the Ninth Circuit retreated from its earlier determination that the 50-50 allocation formula was to be the "fundamental principle" in a judicial apportionment. At the request of the United States, the District Court in 1977 adjusted for the coho fishery in that year the Indian treaty share to 45%. Thus, the Ninth Circuit, when faced with a 45% allocation for one year for one species but 50% for the other species noted that "[t]he numbers question is one of degree, but not one of principle." 573 F. 2d *supra*, at 1130 (A-13, Pet. No. 78-119). Nevertheless, the Ninth Circuit, in adhering to its co-tenancy analogy, held that certain factors should not be considered in a discretionary allocation of the resource. First, the court determined that the number of fishermen in each group, treaty Indians and all other citizens, was "simply irrelevant under the law" *Id.* at 1128 (A-7, Pet. No. 78-119). In the circuit court's view, the only equities to be considered were those of the "quasi co-tenants", not the individual fishermen affected by the allocation. Secondly, while recognizing that the state's hatchery programs, including those supported by license fees and taxes paid only by nontreaty fishermen, producing fish for harvest by all citizens, treaty and nontreaty, constituted one of the "equities that lie on the side of the State of Washington," *Id.*, at 1130, (A-14, Pet. No. 78-119), the Ninth Circuit refused to hold that the state's hatchery contributions were entitled to special recognition in the allocation formula.

Through the orders, decrees, and opinions which have been issued by the courts during this litigation, the nature of the 50-50 allocation formula, as a creature of either law or equity, has remained a mystery. One thing, however, is perfectly clear: Neither the District Court in selecting its allocation, nor the Ninth Circuit in affirming it, has engaged in the discretionary exercise that this Court has required when an accommodation between treaty and nontreaty fishing rights is made necessary. (See *"Puyallup II" supra.*) Both courts have continued to indulge the fiction that the fishing controversy is essentially a dispute over sovereign prerogatives of the State of Washington and the various treaty tribes. As a result, both courts in their various considerations of the allocation issue have entirely ignored the equities of the individual fishermen affected by their decisions. This conceptualization of the controversy has masked the essential nature of the rights at issue — a right to be enjoyed by "every individual Indian," *United States v. Winans, supra,* at 381, "in common with *citizens* of the territory." The proper measure of fishing rights, therefore, involves a consideration of the interests of individual fishermen, as this Court has recognized.

In the first case in which this Court outlined the nature of the Indians' off-reservation fishing right under these treaties, *United States v. Winans, supra,* this Court indicated that the individual interests of treaty Indian and non-Indian fishermen, in contrast to the collective interests of each tribe and the state as "quasi-cotenants", were to be weighed in fashioning an equitable remedy.

In *Winans, supra,* the Court was faced with the claim that the nontreaty respondents were entitled to monopolize the fishery at an upstream location on the Columbia River by their use of four fish wheels set across the river. Respondents' fishing devices were of such a nature as to totally pre-empt fishing by certain Yakima Indians who had "usual and accustomed grounds" at the same location. In rejecting the respondents' claim and ordering an equitable composition of the individual claims of the

Indians and respondents, the Court endorsed the form of equitable remedy proposed by the Solicitor General in his argument to the Court:

> What right the Indians had were not determined or limited. This was a matter for judicial determination regarding the *rights of the Indians and the rights of the respondents.* And that there must be accommodation of them the Solicitor General concedes and points the way.

Id., at 384 (Emphasis supplied.)

The Solicitor's proposals for an equitable adjustment, to which the Court made reference approvingly, are set forth in the concluding section of his brief, which we quote below. For present purposes, the significance of these proposals is that each of them presupposes that the rights of the nontreaty respondents individually, and not merely their collective interests as successor — in — interest to the state as "quasi-cotenant," are to be weighed in an equitable allocation:

> I submit that the decree below should be reversed and the cause remanded for such further proceedings as may be necessary and appropriate. * * * then it will be necessary to consider what justice and equity fairly require. It seems quite clear that the fish wheels are very destructive of the fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone. One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dip nets for the longest possible time without being driven back up the bank or bluff by rising water. There were other favorite spots where they ran trestles out over the water for the same purpose. *In any case, if it is true that they can fish to advantage*

> *elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. On the other hand, they can not claim to have an exclusive right, and, enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing.* If it is not fair *under the present conditions* that they should enjoy without restriction their ancient right of camping and curing fish in temporary houses on the defendants' property, * * * It appears clear, as noted below, that the privilege of pasturage, etc., is confined to open and unclaimed land, and here again it would seem to be the duty of the executive Government to facilitate the enjoyment of the Indians of those rights on the nearest and most convenient available land. By some proper route following the old trails, and at proper hours, with due protection for the defendants' buildings, stock, and crops, *a way of easy access, free ingress and egress to and from the fishing grounds ought to be open to the Indians and be kept open.* (Emphasis supplied.)

Solicitor's *Winans* brief, *supra*, at 54-56.

Unfortunately, the decision of the lower court following the remand of the *Winans* case is not reported. However, the approach advocated by the Solicitor in *Winans* was again confirmed by this Court seventy years later when once again faced with the possible preemption of an Indian fishery in their "usual and accustomed grounds."

In *Puyallup II*, *supra*, this Court explicitly enumerated factors that must be considered when it is necessary to make a discretionary allocation of a fishery between treaty Indian and nontreaty fishermen. That enumeration employed terms that make clear that the equities of the individual fishermen affected must be weighed:

> What formula should be employed is not for us to propose. There are many variables — the number of nets, the number of steelhead that can be caught with nets, the places where nets can be placed, the length of the net season, the frequency during the season when nets may be used. On the other side are the number of hook-and-line licenses that are issuable, the limits of the catch of each sports fisherman, the duration of the season for sports fishing, and the like.
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

Puyallup II, *supra*, at 48-49.

Nothing could be clearer from the record in this case than that the District Court completely ignored the equities of the individual nontreaty fishermen in setting allocation percentages. The court rejected motions by individual nontreaty fishermen and their representative organizations to intervene as parties in the original action.

Additionally the District Court's findings of fact in its original decision underscore its neglect of the individual nontreaty fisherman's interest in the fishery. In dividing "equally" various fish runs between the nontreaty commercial fishermen of the state and certain Indian tribes, the court in some instances elevated the aggregate interests of a sparse number of part time treaty fishermen of a given tribe to the same status as the aggregate interests of commercial fishermen many times their number and consequently more dependent upon the opportunity to fish. For example, those findings in the original trial reflect the following number of fishermen for each tribe:

- Hoh—5 full-time, 10 part-time (FF 40, Joint App. 117)
- Lummi—8 commercial, 150 total (FF 58, Joint App. 123)
- Makah—60 regular, 90 part-time (FF 67, Joint App. 127)
- Muckleshoot—35-50 (FF 79, Joint App. 131)
- Nisqually—10 full-time, 10 part-time (FF 93, Joint App. 137)
- Puyallup—30-40 (FF 100, Joint App. 138)
- Quileutte—34 (FF 115, Joint App. 144)

Quinault—few off reservation (FF 124, Joint App. 146)

Sauk-Suiattle—30 (personal use not commercial) (FF 132, Joint App. 148)

Skokomish— (No specific findings re number
Squaxin Island— of tribal fishermen)

Stillaguamish—personal use (FF 146, Joint App. 153)

Upper Skagit—30 primarily subsistence (FF 148, Joint App. 154)

Yakima—fishing Columbia — not case area (FF 157-158, Joint App. 157-58) 5 in case area (FF 163, Joint App. 160)

In contrast to this relatively small number of Indian fishermen, which includes recreational fishermen as well as commercial (when not designated above as commercial or full- or part-time), the court found in FF 188, Joint App. 168, that there were 283,650 sport fishermen and 6,600 commercial fishermen in the State of Washington.

The District Court's insensitivity to the equities of individual nontreaty fishermen has continued through this litigation. It is eptomized by the conclusion expressed by the District Court in June, 1978:

> * * * economic disruption associated with implementing the 1974 decree is not legally cognizable.

(C.L. # 4, June 6, 1978, C-10, Pet. No. 78-139)

That court repeatedly referred to the nontreaty fishermen as having a "privilege" to fish rather than the "right" of Indians; e.g.,

> * * * members of the Lummi Tribe are entitled to and shall have, as a matter of *right*, the opportunity to fish * * * while non-treaty fishermen * * * have the *privilege* of fishing * * * they do not have the *right* to do so.

U.S. v. Washington, 384 F.Supp., *supra*, at p. 345 (emphasis in original). (Joint App. 91).

The District Court's denial of non-Indians' right to fish is in contradiction of the holding of this Court that the treaties recognize the rights of both. In *Winans, supra*, at 384, the Court referred to "the rights of the Indians and

the rights of the respondents." In *Puyallup III, supra*, at 177, the Court noted "the right is to be shared in common with the non-Indian citizens * * *".

This recognition of the parity in rights to the fishery sharred by Indians and non-Indians alike is consistent with this Court's mandate in *Puyallup Tribe v. Department of Game* (*Puyallup I*), 391 U.S. 392, 403 (1968), *quoted in Puyallup II, supra* at 45, that the state court on remand was to consider "the issue of equal protection implicit in the phrase 'in common with'."

The equal protection clause of the Fourteenth Amendment states that "(n)o state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

If the treaties of 1854-55 created or sanctioned special rights for Indians, the subsequent passage of Amendment XIV has superseded the treaties, in the same manner that a subsequently-passed statute overrides a prior inconsistent treaty. pp. 75-77, *infra*. Congress cannot authorize a state to violate the equal protection clause. *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *see also, Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). If the Stevens' treaties require the state to prohibit or limit the exercise of nontreaty citizens' *privilege* to fish, 384 F.Supp., *supra*, at 345 (Joint App. 91), while guaranteeing to Indians a greater *right* to fish, they are now void by virtue of the equal protection clause.

An interpretation of the treaty language that avoids, rather than creates, conflicts with constitutional provisions is therefore required. As this Court has observed:

An interpretation of the treaty language that avoids, rather than creates, conflicts with constitutional provisions is required. It is well-established that even the federal government cannot by treaty violate constitutional restrictions:

> There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything

> in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. * * * It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. (Footnote omitted.)

Reid v. Covert, 354 U.S. 1, (1957).

This Court has noted that the Stevens treaties could be harmonized with relevant constitutional principles by the construction of the treaties in light of equal protection concepts. *Puyallup I, supra* at 403; *cf., Puyallup II, supra*. The District Court, in contrast, has criticized the Court's approach in the *Puyallup* cases (*see* 384 F. Supp., *supra* at 338 (Joint App. 77-80)), and has entirely ignored "the issue of equal protection implicit in the phrase 'in common with'." *Puyallup I, supra* at 403. It has interpreted the treaties in a manner that denies that non-Indians have rights requiring that the law be applied to them in a nondiscriminatory manner. In so doing, the District Court has reached a result that the signers of the Stevens treaties never envisioned.

The only interpretation of the treaties that is consistent with both the intentions of the treatymakers and the dictates of the equal protection clause is the one urged above: the state fulfills its obligations under the treaties by allowing all citizens, Indian and non-Indian, to participate in the fisheries on a nondiscriminatory basis.

3. Collective Interests of the State and Tribes.

This Court has also indicated that, in addition to the interests of individual fishermen, the collective equities of the state and the treaty tribes are to be weighed in an

allocation of the fishery. One such equity is the state's contribution of hatchery produced fish to the resource available for harvest by both treaty Indians and all other citizens.

In *Puyallup II, supra*, this Court called the trial court's attention to the substantial annual contribution to the fish resource made by the state's steelhead hatchery program, supported mainly by license fees charged to nontreaty sport fishermen. Upon remand, the state trial court also recognized this equity and confined the allocation of steelhead between the Puyallup Indian net fishery and the nontreaty sport fishery to the portion of the total fish run derived from the natural run.

This Court's decision in *Puyallup II, supra*, was rendered after the District Court trial but before judgment was entered. Accordingly, the state urged the District Court to exclude from any allocation of the fishery those fish which reflect the state's contribution to the salmon and steelhead resource through its hatchery programs. The District Court, however, declined the request and in its judgment chose to defer the issue until after the state court determined the issue in *Puyallup*. (384 F. Supp. *supra* at 344-45, Joint App. 90-91).

After the state trial court ruled that hatchery fish are excluded from any allocation, and again after the state supreme court affirmed (86 Wn. 2d 664, 548 P. 2d 1058 (1976), the state moved that the District Court modify its allocation formula to remove state hatchery-produced salmon and steelhead fish from the resource pool available for allocation. On both occasions the District Court declined, insisting that prudence required its deferral of the matter until this Court had an opportunity to review the allocation scheme affirmed by the Washington Supreme Court.

On June 23, 1977, this Court entered its opinion in *Puyallup III, supra*, upholding the trial court's allocation of steelhead.[47] The propriety of the trial court's allocation

[47]The petitioner Puyallup Tribe in *Puyallup III*, supra, did not contest the validity of the trial court's exclusion of hatchery fish, and

having been settled beyond any further appeal, the state again moved the District Court to modify its allocation scheme in conformance with the outcome in the *Puyallup* cases. Motion of August 8, 1977. As of this date, December 7, 1978, the court has not ruled on the state's motion.

The hatchery fish issue is not the only equity on the side of the State of Washington which has been ignored by the court in the exercise of its continuing jurisdiction. One of the original "inequities" is the court's "equitable adjustment" (384 F. Supp., *supra*, at 344 Joint App. 90). for fish harvests by state citizens in the ocean of salmon destined for "usual and accustomed grounds." The court has declined to modify this system of adjustments even after Congress enacted the Fishery Conservation and Management Act of 1976 (FMCA), 90 Stat. 331 (codified at 16 U.S.C. § 1801-1882). Congress by that act has preempted state jurisdiction and control over the fishery in waters extending beyond the three-mile limit of the state's territorial jurisdiction. Section 101 of FMCA defines the fishery conservation zone to extend between three and two hundred miles off-shore; and §§ 102 expressly provides:

> The United States shall exercise *exclusive* fishery management authority, in the manner provided for in this chapter, over the following:
>
> (1) All fish within the fishery conservation zone.
>
> (2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone.

(Emphasis added.) Regulation of the salmon fishery beyond state territorial waters is now exclusively within the province of the federal government. Fishermen from California, Oregon and Alaska harvest Puget Sound origin

hence the Court declined to address the issue specifically. 433 U.S. at 177, fn. 17. Thus, the trial court's exclusion of hatchery fish from the allocation remained as the governing law.

salmon in these waters under authority of the United States.[48]

If there is any inequity done to the treaty fishermen by this harvest of salmon outside most of tribes' usual and accustomed grounds, the equity must now lie against the United States and all fishermen fishing under its authority. Yet, under the court's orders, only the Washington nontreaty commercial net fishermen are penalized. Catches by Washington fishermen in this federal fishery are singled out and applied against the nontreaty fishermen's 50% share. Puget Sound commercial fishermen are thereby dealt a particular injustice by the District Court's continuation of its "equitable adjustment." The 50% share of salmon available for harvest by these fishermen is reduced by the fishing activities of Washington fishermen in the federal fishery; yet, because of the federal preemption, the Puget Sound fishermen have no recourse to restrict that ocean fishery, nor does the state.

Indeed, it is worthy of note that presently there are three areas in which jurisdiction is asserted over Washington (and Indian) fishermen. In the ocean the United States government, through the Department of Commerce, regulates Indians and non-Indians. The United States has made no effort to get any percentage of salmon to Indians fishing there, nor to return any specified percentage to inside waters. In IPSFC waters, the United States through Commerce (for non-Indians) and Interior (for Indians) regulates. They have not attempted to provide a 50%-plus allocation of the fishery to treaty Indians. In contrast in those Washington waters where the state regulate the fishery the United States and the tribes demand that the state provide for Indians the

[48]United States regulations (50 CFR 661, et seq.) provide special fisheries for four coastal tribes. Special fisheries have been allowed each year with the special 1978 seasons found in 50 CFR 661.11 (43 Fed. Reg. 15, April 14, 1978). They allow coastal Indians to fish for two months before non-Indians begin and to fish during a two-week conservation closure, but the regulations make no effort to grant a certain percentage of fish to treaty Indians.

50% plus" and also an additional number of fish to reflect ocean harvests of fish caught under the United State's regulations.

4. **Summary.**

The allocation by the District Court and the provision for equitable adjustment for ocean and IPSFC fish caught by non-Indians constitute an abuse of the court's discretion not justified by the "in common with" language. In failing to accord any weight to the equities of the state and, more importantly, to those of the individual fishermen affected by its decision, the District Court has ignored the declarations of this Court and the "issue of equal protection implicit in the phrase 'in common with'." *Puyallup I, supra* at 403.

D. IF THE TREATIES CREATE AN OBLIGATION TO ALLOCATE FISH, THE STATE HAS THE AUTHORITY TO IMPLEMENT SUCH ALLOCATION.

1. **Introduction.**

In 1963, a civil action was commenced in state court to determine the nature and extent of Indian fishing rights derived from the Stevens treaties of 1854-55.[49] Since that time, the state courts have continued to exercise jurisdiction with reference to the *"Puyallup"* case and to take appropriate steps pursuant to remand instructions by this Court.[50]

While the remand from *Puyallup I, supra,* was pending in state court, an action was filed in September, 1970, in the United States District Court for Western Washington requesting an interpretation of the same treaty language (*U.S. v. Washington,* No. 9213). The

[49]The specific treaty there involved was the Treaty of Medicine Creek, *supra.*

[50]*Puyallup I,* 70 Wn. 2d 245, 422 P. 2d 254 (1967), and 391 U.S. 392 (1968); *Puyallup II,* 80 Wn. 2d 561, 497 P. 2d 171 (1972) and 414 U.S. 44 (1973); *Puyallup III,* 86 Wn. 2d 664 (1976) and 433 U.S. 165 (1977).

federal District Court, rather than deferring to the continuing proceedings in state court construing the same treaty provision, proceeded to trial after the state supreme court decision in *Puyallup II* in 1972 and prior to the *Puyallup II* decision of this Court in November, 1973. Subsequently, the state courts and the federal courts have continued to independently construe the same treaty provision and have reached different interpretations of that provision. Both court systems have refused to invoke the doctrines of comity and abstention with respect to proceedings in their sister courts. The divergence of the two separate court systems in their respective constructions of the same treaty provision has made it extremely difficult, if not impossible, for the Washington Department of Fisheries to comply with the conflicting orders from the courts of each system.

The department has attempted in good faith to comply with the orders of the federal court as evidenced by the prior discussion respecting the IPSFC, *infra* pp. 11-15, and the following recognition by Judge Boldt:

> First, I wish to make it clear that in my judgment, particularly during the last several months or year, I believe that the state Fisheries Department has made a bona fide and genuine effort to begin the enormously difficult problem of putting *United States v. Washington* into effect. If we did not know it otherwise, newspaper accounts almost every day show what an extremely difficult task has been layed upon the Fisheries Department.

(TR 42, Oct. 25, 1975, Joint App. 519.)

Yet, on more than one occasion, state courts have immediately enjoined the department from regulating the fishery in a way necessary to achieve full compliance with the District Court's orders. This has precipitated counter-injunctions by the District Court, and a stalemate between the two court systems.

The State of Washington and its Department of Fisheries cannot emphasize too strongly that they do not propose to inhibit the enforcement of proper federal court orders. In fact, the director of the department has

consistently promulgated regulations to implement District Court orders. In the wake of his issuance of those regulations, state court injunctions have followed. As a result, on several occasions, motions have been filed in both the state and federal courts seeking to hold the director in contempt of the respective court systems. Faced with this quandary, the Department of Fisheries has successfully sought the assistance of this Court in resolving the disagreement between the state and federal courts.

As we have noted, the Washington state courts, including the state supreme court, have construed the Indian treaties in a manner different from that adopted by the District Court and the Ninth Circuit. The state courts have held that the equality implicit in the phrase "in common with" is an equality among individual citizens whereas the District Court and Ninth Circuit have found that it is equality between two groups, treaty Indians and all others.

We have argued in this brief that the former interpretation of the treaty provision, the one adopted by the state court, is correct. We believe that the District Court's and Ninth Circuit's construction of the treaties here at issue is erroneous as a matter of law and unjust as a matter of fact. Whatever the decision of this Court, the state will implement it. The state believes that after a decision by this Court it will be in a position to comply with District Court orders, if the same are necessary to comply with this Court's decision. We do not believe the state court could or would take a different point of view: We are confident that they will accede to this Court's interpretation of the treaties in the future just as they have in the past, as this Court expressly found in *Puyallup III*, *supra*, at 177.

2. **State Law.**

The law of the State of Washington, like that of other jurisdictions, is that fish in state waters are a resource for the benefit of all of its citizens. The Washington Supreme

Court again enunciated this principle in *Washington Kelpers v. State*, 81 Wn. 2d 410, 502 P. 2d 1170 (1972):

> "The food fish in the waters of the state belong to the people of the whole state, and the state through its legislature has the same right of regulation and control of this property that it has of any other state property.

Supra at 413; also see, *Vail v. Seaborg*, 120 Wash. 126, 207 Pac. 15 (1922). The state court's reference to the fish as "state property" is, as this Court has noted, a legal fiction used to express the "importance to its people that a state have power to preserve and regulate exploitation of an important resource." *Baldwin v. Fish & Game Comm'n of Montana*, 46 Law Week 4501 (1978), quoting *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977).

To protect, perpetuate and manage the salmon, the Washington legislature has conferred broad authority upon the director and Department of Fisheries (see RCW 75.08.012, .014, and .080). The nature and extent of that power has been construed by the Washington Supreme Court in a number of cases, including *"Gillnetters," supra*, and *"Passenger Vessel 2," supra*, which are now before this Court.

In recently upholding a statute which prohibited the use of sport gear for commercial fishing, the Washington court extensively discussed the validity of the state allocating fish harvests between types of fishing gear. *Washington Kelpers v. State*, *supra*. In considering that question, the court cited with approval its earlier decisions in *Vail v. Seaborg*, *supra*, and *McMillen v. Sims*, 132 Wash. 265, 231 Pac. 1943 (1925), in which administrative regulations allocating fish harvests between types of fishing gear were upheld. In *Kelpers*, *supra*, the court observed that the state constitutional provision (Article I, § 12), is the equivalent to the United States Constitution, Amendment XIV, as interpreted by this Court, and that both:

> require that *class legislation must apply alike to all persons within a class and reasonable ground must exist for making a distinction between those with, and those without, a designated class.*

Supra at 421, quoting *Clark v. Dwyer,* 56 Wn. 2d 425, 353 P. 2d 941 (1960), cert. denied, 364 U.S. 932 (1961) (emphasis added).

Later in the *Kelpers* decision the court declared:

> A reasonable classification is one 'which includes all [and only those] persons who are similarly situated with respect to the purpose of the law, * * * (brackets by the court)

Supra at 422.

The court then proceeded to conclude that classifications by gear type are permissible but all persons must be allowed the use of any given gear under the same conditions.

In the two decisions before this Court, *"Gillnetters," supra,* and *"Passenger Vessels 2," supra,* the Washington court has concluded that the Department of Fisheries cannot by regulation allocate the harvest of fish between treaty Indians and all other citizens. These decisions are consistent with the earlier opinions previously mentioned which have upheld the allocation of the fish harvest between types of fishing gear but not between persons similarly situated.

> Classification which distinguishes between commercial and noncommercial fishermen has a reasonable basis in fact, which is related to the legitimate governmental purposes of conservation and promotion of the economic welfare of the state.

Gillnetters, supra at 691.

In both *"Gillnetters," supra,* and *"Passenger Vessels 2," supra,* the state supreme court determined that Indian treaty fishermen are of the same class as nontreaty fishermen with respect to the opportunity to harvest fish. In making this determination, the court noted:

> * * * treaty Indians have always been afforded the same opportunities as non-Indians to fish commercially by trolling, purse seining, gill netting, or reef netting, and to fish for recreational and other purposes.

Gillnetters, supra at 691.

Having thus decided that Indian and non-Indian fishermen are members of a single class, the court concluded that the Department of Fisheries could not in its regulatory pattern allocate fish between members of what they have determined to be a single class.

If this Court now concludes that Indian treaty fishermen and all other fishermen are not members of the same class with respect to an allocation of fishery, it will thereby lay the foundation for the validity under state law of a separate classification of treaty Indian fishermen for the purpose of allocation. We would respectfully submit that if the Court rejects our earlier argument and finds that treaty Indian fishermen are a special class for allocation purposes, such a conclusion would remove the impediment found by the Washington Supreme Court to the exercise of necessary regulatory power by the Department of Fisheries to allocate between Indian and non-Indian fishermen.

E. THE COURT OF APPEALS ERRED IN UPHOLDING THE DISTRICT COURT'S ASSUMPTION OF CONSERVATION MANAGEMENT AUTHORITY OVER THE SALMON FISHERY.

1. Introduction.

Fisheries will be able to comply with the Court's decision in this case even if it requires some type of allocation of the fishery. In such an eventuality, we assume that the District Court will return the allocation and conservation management authority over the treaty Indian fishery to the state and its Department of Fisheries.

In this section of our brief, we shall argue that a return to the fisheries management system which existed prior to the court's extraordinary assumption of authority in August, 1977 will be inconsistent with long-standing principles of federalism governing the management of fisheries resources. Specifically, we contest the lawfulness of the District Court's interference in the state's definition and implementation of a conservation management

program for the fish resource in its territorial waters. This interference commenced with the District Court's judgment in 1974, and has continued to the present day.

2. Nature and Extent of the District Court's Interference With the State's Management of the Salmon Fishery.

The State of Washington, for the protection and effective utilization of a public resource, has exercised its sovereign prerogative to define and implement a conservation policy for the fish found within its territorial waters. Although the state has not historically asserted such authority within Indian reservations, this Court has recently declared in *Puyallup III, supra,* that the state can act even within a reservation if necessary to insure the successful realization of its conservation objectives.

The decisions of the District Court and Ninth Circuit in this case, however, have arrogated the state's traditional management authority in this area and have substituted the District Court as the manager of the fish resource in state territorial waters.

Prior to these decisions, the state had defined and implemented three objectives for its salmon conservation program: (1) to preserve fish stocks; (2) to attain the optimum sustainable yield; and (3) to provide an orderly fishery. The first of these objectives is self-evident in its relationship to conservation and need not be discussed in further detail.

The second objective — optimizing the salmon resource available for harvest over time — recognizes that the salmon in the waters of the state are a valuable, renewable food and recreational resource for the citizens of the state and the nation. In pursuance of this objective, the Department of Fisheries is authorized to reduce or prohibit fishing on immature salmon. This is not because those runs could not withstand a greater harvest, but because the foregoing of a harvest on immature fish in one year will produce proportionately greater pounds of fish in succeeding years.

The third objective — the provision of an orderly fishery — is less obviously but no less indispensably related to the goal of salmon resource conservation. At base, conservation regulations are an attempt to enforce a sacrifice of fishing opportunities upon a group of fishermen with similar characteristics (i.e., Puget Sound gillnetters). The success of a regulatory program is entirely dependent upon its ability to equitably pro-rate this sacrifice among all fishermen within a major gear-area category. If fishing seasons and gear limitations even appear to favor one part of a group over another, disfavored elements will be induced to fish in violation of conservation regulations. When such violations persist to any degree, an avalanche of illegal fishing is bound to occur, as other fishermen quickly realize that unless they too fish in violation of conservation regulations, they will be "cheated" out of their harvests by the illegal fishing of others. Once such a situation erupts, it is virtually impossible for an enforcement agency to save the salmon runs from overfishing.

In order to avoid such anarchy on its waters, and the attendant destruction of salmon runs for future years, the Department of Fisheries divides the state's territorial waters into geographic fishing zones, and sequentially opens and closes these zones to different types of fishing gear. By manipulating fishing times and gear limitations for each zone, the Department is able to insure a fair opportunity for all fishermen to participate in the fishery, and thereby obtains the fishermen's respect for and compliance with its conservation regulations.

For reasons never clearly articulated, both the District Court and the Ninth Circuit have nullified the state's definition of its conservation policy and substituted their own narrower definition of conservation.[51] In the words of the Ninth Circuit:

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[51]It should be noted that the court's definition of conservation is in conflict with that declared by Congress in the Fishery Conservation and Management Act of 1976 (18 U.S.C. § 1802 and 1801(b)).

> "* * * the only rationale for permitting state interference with Indian fishing precludes the adoption of this (the state's) definition and restricts the meaning of conservation to insuring optimum spawning escapement for perpetuation of the run."

(520 F. 2d, *supra* at 686.) (Joint App. 48).

Thus, state regulations designed to maximize the salmon harvest and provide an orderly fishery for all fishermen cannot now apply to off-reservation treaty fishing. With reference to such treaty fishing, the state's regulatory authority, where it exists at all, is confined to the goal of species perpetuation. The adoption of enhancement programs, which would increase the number of fish and the economic value of the harvest for both Indians and non-Indians, is substantially impaired by the court's rejection of the state's policy of seeking an optimum sustainable yield. The dilemma presented is how can a fish management agency effectively manage a single highly mobile resource when different standards of conservation must be used according to who is seeking to harvest the fish.

The courts' rejection of state regulation of treaty Indian fishing to insure an orderly fishery for all is especially baffling. The District Court itself recognized that the realization of this objective can be critical to the perpetuation of the runs, let alone the optimization of the resource:

> It is necessary for the fishing activity of Indians and non-Indians to be regulated in order to assure that conservation of the fishery resource is achieved. [Citing record.] Observance of fishery regulations is important to the achievement of conservation of the resource. A regulation is more likely to be observed if it is simple to understand, reduces conflicts between interest groups, appears fair to, and wins the confidence of, the fishermen. For this reason, regulations which have as their purpose the attainment of an orderly fishery can be helpful in achieving conservation.

384 F. Supp. at 386 (FF 181 Joint App. 166). Nevertheless, the District Court unaccountably excluded this objective

from the lawful exercise of state conservation regulations of off-reservation treaty Indian fishing. If the extent of illegal fishing by both treaty and nontreaty fishermen is any indication, the damage to the salmon resource occasioned by the forced abandonment of the state's orderly fisheries objective has been considerable.

Unfortunately, the District Court's interference with the state's conservation program has not been limited to a redefinition of its objectives. The court has also usurped the state's authority to implement a conservation program. It has permitted numerous separate tribes and bands involved in this litigation to participate in the everyday management of the off-reservation fishing activities of treaty Indians. These tribes, the majority of which have limited experience or expertise in the complex science of fisheries management, may promulgate and enforce season and gear regulations for their members. In some cases, tribal regulations are inflexible instead of being varied and revised during the year or from year to year in order to accommodate the variable conservation needs of the salmon runs affected. Yet, all state general regulations in conflict with tribal regulations are prima facie invalid as applied to treaty Indian fishermen. Before the state can enforce regulations of general applicability on treaty Indians fishing in usual and accustomed grounds, it must first establish to the satisfaction of the District Court that the regulation is "reasonable and necessary for conservation." 520 F. 2d *supra* at 683. The department's management of treaty Indian fishing for conservation purposes has sometimes been reduced to enforcing after-the-fact emergency closures of treaty Indian fisheries when salmon runs have already been overfished.

The District Court's decision has imposed special restrictions upon the state as to the certain tribes denominated "self-regulating". The state is apparently precluded from enforcing any conservation regulations as to members of self-regulating tribes fishing off the reservation. 384 F. Supp. at 340-342, 410. If the fish harvests by members of such a tribe exceed their allocable

share of the salmon resource, or threaten to injure or destroy the salmon runs in a particular area, the state must apply to the District Court for relief. If relief is afterwards granted, the state is still not permitted to enforce compliance with the decree of relief, but must instead rely on compliance by the self-regulating tribe and its members. See 384 F. Supp. *supra*, at 410. (Joint App. 211).

Finally, in addition to its arrogation of state authority to define and implement a conservation policy for the salmon fishery, the District Court has exercised its newly-claimed authority in a manner that discriminates against nontreaty fishermen. The court's management program does not equitably pro-rate the sacrifices necessitated by conservation goals between the two groups — treaty Indians and all other fishermen — let alone among the individual fishermen themselves. Instead, before any restriction on the off-reservation fishing activities of treaty Indians can be imposed, the state is required to exhaust its regulatory alternative upon the participants in the general fishery. 384 F. Supp., *supra*, at 342. (Joint App. 87). In affirming, the Ninth Circuit expressly held:

> "* * * the state must also show that the conservation objective can not be obtained by restricting only citizens other than treaty Indians."

520 F. 2d *supra*, at 683. Not unexpectedly, the District Court's imposition of a disproportionate share of the burdens of conservation upon nontreaty fishermen has precipitated the rash of uncontrollable illegal fishing activities that an intelligent management program attempts to avoid through the provision of an orderly fishery.

3. The District Court's Assumption of Management Authority Over the Salmon Fishery is Unlawful.

At the time of the District Court's original judgment in this case in 1974, the authority of the state to regulate

off-reservation treaty-authorized fishing by Indians had long been established by the decisions of this Court. *United States v. Winans*, 198 U.S. 371 (1905)[52]; *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916)[53]; *Tulee v. Washington*, 315 U.S. 681 (1942)[54]; *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968)[55]; *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).[56]

Nevertheless, the District Court felt itself unpersuaded by this line of authority, and devoted several pages in its opinion to an attack upon the conceptual foundations of this Court's decisions sustaining state jurisdiction over off-reservation treaty Indian fishing. See, 384 F. Supp. *supra*, at 334-339. (Joint App. 77-81). The court concluded its discussion with an acknowledgment

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[52] "* * * Nor does it [the Indian treaty provision permiting the taking of fish at usual and accustomed places] restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." 198 U.S. 371, 384.

[53] "* * * Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised." 241 U.S. 556, 564.

[54] "* * * while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." 315 U.S. 681, 682.

[55] "* * * Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one 'in common with all citizens of the Territory.' Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. * * *" 391 U.S. 392, 398.

[56] "* * * We said that 'the manner of fishing, the size of the take, the restriction of commercial fishing and the like may be regulated by the State in the interest of conservation, provided regulation * * * does not discriminate against the Indians.' * * * *Puyallup Tribe v. Department of Game*, 391 U.S. 392, at 398." 414 U.S. 44, at 48.

that as a lower federal court it was bound by the decisions of this Court. But the District Court's delegation of daily fishery management authority to each of the tribes and bands involved in this case, and its creation of "self-regulating" authority in certain tribes, belies the sincerity of its humble acknowledgment.

Encouraged by its successes in the District Court, one of the tribes, the Puyallup, again challenged the legitimacy of state conservation regulation of Indian treaty fishing in *Puyallup Tribe v. Department of Game (Puyallup III)*, 433 U.S. 165 (1977). The contentions of the tribe were again firmly rejected by this Court:

> Thus, Puyallup I settled an important threshold question in this case—regardless of tribal sovereign immunity, individual defendant-members of the Puyallup Tribe remain amenable to the process of the Washington courts in connection with fishing activities occurring off their reservation. That conclusion was predicated on two separate propositions worthy of restatement here.
>
> First, even though the individual defendants were members of the Tribe and therefore entitled to the benefits of the Treaty of Medicine Creek, that treaty as construed by this Court does not confer the complete individual immunity they claim. The State may qualify the Indians' right to fish "at all usual and accustomed places." Specifically, we held that the "manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."

Id. at 171.

The legitimacy of state regulation of off-reservation Indian treaty fishing must be regarded to have been settled by this Court. The state's authority to regulate such fishing derives from its power to conserve the natural resources within its boundaries, a power which inheres in the state's sovereignty over all of the territory under its jurisdiction. *Kennedy v. Becker, supra,* at 562-63; *Ward v. Race Horse,* 163 U.S. 504, 507 (1896); *Greer v.*

Connecticut, 161 U.S. 519 (1896). More recently, this Court observed:

> the importance of its people that a state have power to preserve and regulate the exploitation of an important resource.

Baldwin v. Fish & Game Commission of Montana, 46 L.W. 4501 (1978), quoting *Douglas v. Seacoast Products Inc.,* 431 U.S. 265, 284 (1977). (That case also discusses the "ownership" theory cases going back to *McCready v. Va.,* 94 U.S. 391 (1876) and *Geer v. Connecticut,* 161 U.S. 519 (1896). The exercise of the state's power over the fishing activities of all fishermen, treaty Indians as well as other citizens, is necessary for the fulfillment of the treaties and the state's fiduciary duty to preserve the resource for the benefit of all citizens.

Congress may preempt the field of management of some natural resources. See, *Missouri v. Holland,* 252 U.S. 416, 64 L. ed 641, 40 S. Ct. 382 (1920). However, Congress has not purported to preempt the state's management of the anadromous fish resources here in question. In fact, the Fisheries Management and Conservation Act of 1976, 90 Stat. 331, Congress expressly provided that:

> except as provided in subsection (b) of this Section (providing for federal control of all ocean fisheries in the event of state interference with a federal fisheries management program in coastal waters beyond three miles), nothing in this section shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries.

16 U.S.C. § 1856(a). In addition, subsection (b) of the above provision specifically exempts from special federal "takeover" jurisdiction the "internal waters" of the state. (16 U.S.C. § 1856(b)) Congress thus has continued to recognize the authority of the state to regulate the salmon fisheries in its waters rather than preempting the state's authority. It has been preserved. See: *Carey v. South Dakota, 250 U.S. 118 (1919).*

In settling the question of state regulation of off-reservation Indian fishing for conservation purposes,

this Court has also resolved the ancillary issue of whether the state's authority is preemptive or concurrent with the Indian tribes whose members are regulated. Over sixty years ago, in *Kennedy v. Becker, supra,* this Court recognized that the very nature of the activity to be regulated will admit of no other regulatory authority but one. This conclusion is no less true today.

In *Kennedy v. Becker, supra,* the United States, as amicus curiae, joined the plaintiff-in-error in arguing in its brief to this Court that Indian tribes retained the power to regulate the off-reservation fishing activities of their members:

> The hunting and fishing rights involved are a part of the original Indian rights of occupancy, reserved in the very instrument of cossion, never relinquished, and continuously held under the ancient Indian title. The locus in quo, therefore, always remained an Indian reservation pro tanto.

(Brief of the United States in *Kennedy v. Becker,* at p. 9)

This Court, however, rejected the proposition that Indian tribes were entitled to regulate the fishing activities of their members in a manner that thwarted the state's conservation program:

> The *contention of the plaintiffs* in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quod hoc.* As the plaintiffs in error put it: 'The land itself became thereby subject to a joint property ownership and the *dual sovereignty* of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be.' *We are unable to take this view.* It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. *Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.*

(Kennedy v. Becker, supra, at 562-63 emphasis supplied.)

This Court's recognition that the task of conservation of the fishery requires that the state exercise preemptive authority over the fishing activities of treaty Indians is no less valid for the salmon fishery in Washington's waters. As we have noted above, see discussion at pp. 19-25, *infra,* the efficacious conservation management of the salmon fishery is a complex and delicate enterprise. As the salmon return to Washington waters, data on the size of the runs and the impact of fishing activities upon them must be rapidly collected, assimilated, and analyzed. In light of this new data, fishing regulations are quickly reformulated, promulgated, and enforced. If these state conservation regulations are to have any hope of success, fishermen must understand that these regulatios are the law that binds them.

Under the current fractionalization of regulatory authority, however, the treaty Indian fisherman is subjected to two different, often-conflicting voices of authority — that of the state and his tribe. In 1976 the state's Department of Fisheries was required to intervene on over 20 separate occasions to close down treaty Indian fisheries on depleted salmon runs, fisheries which had been authorized by their respective tribes.[57]

The federal court has on over a dozen occasions found it necessary to close on-reservation fishing where runs were being depleted. (See, e.g. Joint App. 474) In the fractured regulatory authority characteristic of the current court-ordered system, there is frequently undue delay between the recognition of an unanticipated conservation crises and in the critical terminal areas the cessation of treaty Indian fishing in those areas.[58] That delay can be fatal to a conservation program, as the testimony of expert witnesses underscores.

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[57]In 1977 over *50* such closures were effected.

[58]Sometimes that agreement is not obtained, and treaty fishermen continue to fish in violation of emergency conservation closures of the fishery. See e.g. TR 47, 49, 50, 71-72, 90 May 9, 1977.

Thus, with respect to Indian and non-Indian fishing activities occurring in state territorial waters lying outside of Indian reservation boundaries, the state's authority to implement its conservation objectives should supersede those exercises of Indian tribal authority over tribal members which are in conflict with it. This proposition has always been the law of the land, and until 1974, was the law in the state of Washington. *Ward v. Race Horse, supra,* at 516; *Kennedy v. Becker, supra,* at 562; *Puyallup III, supra,* at 171-72, 173-177. It is also consistent with this Court's enunciation of the modern view of Indian law in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973):

> * * * tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities * * * not on any reservation.' Organized Village on Kake, supra, at 75, 7 L Ed 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state laws otherwise applicable to all citizens of the State. See, e.g., Puyallup Tribe v. Department of Game, 391 US 392, 398, 20 L Ed 2d 689, 88 S Ct 1725 (1968); Organized Village of Kake, supra, at 75-76, 7 L Ed 2d 573; Tulee v Washington, 315 US 681, 683, 86 L Ed 1115, 62 S Ct 862 (1942); Shaw v Gibson-Zahniser Oil Corp., 276 US 575, 72 L Ed 709, 48 S Ct 333 (1928); Ward v Race Horse, 163 US 504, 41 L Ed 244, 16 S Ct 1076 (1896).

Id., at 148-149.

Adherence to these principles requires that the principal authority for managing the fishing in state waters be returned to the state and its Department of Fisheries. In the first place, the District Court's innovation of the "self-regulating" tribe must be reversed.[59]

Ths District Court's initial act in creating such a jurisdictional species was without any statutory or treaty authority, the court resting the legitimacy of its action upon an amorphous "philosophy of Congress" favoring

[59]Although only two tribes, the Yakima and Quinault Tribes, have been granted the status of "self-regulating" tribes, other tribes have applications for such recognition pending before the District Court.

"the exercise of tribal autonomy." 384 F. Supp. *supra,* at 340.[60]

The Ninth Circuit, in affirming this novel exercise of statutory interpretation, was equally lax in supporting its decisions with relevant authority. The court re-characterized the lower court's innovation as an exercise of "equitable discretion," 502 F. 2d *supra,* at 686, citing both its own holding in *Settler v. Lameer,* 507 F. 2d 231 (9th Cir. 1974), and a principle that "regulatory interference by the state with treaty fishing is obnoxious to the treaty tribes."[61] *Id.* However, the holding in *Settler, supra,* while sanctioning tribal regulation of its members' off-reservation fishing activities, did not conclude that such tribal regulation was preemptive of overriding state conservation regulations. Likewise, the court's determination that state regulation is inherently "obnoxious to the treaty tribes" is at odds with this Court's decisions in *Puyallup I, supra* and *Puyallup III, supra.*

In the absence of any statutory or treaty authority for the recognition of tribal "self-regulating" authority over the Indian fishing activities occurring outside the reservation; in light of this Court's rejection of such authority in *Kennedy v. Becker, supra;* and in view of the

[60]The only authority cited by the District Court to support its reliance on this "philosophy of Congress" was the Indian Civil Rights Act of 1968, Pub. L. 90-284, 90th Cong. H.B. 2516, April 11, 1968. It is difficult to understand the court's reliance. The Act limits Indian tribes "in exercising powers of self-government" by imposing on them requirements comparable to the Bill of Rights, fostering federal codes governing their courts and making provision for the assumption of state jurisdiction. It is regarded by some Indians as destructive of their traditions and government. *Hearings on S. 211 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong. 1st Sess. (1969), reproduced in part in 2 Am. Indian L. Newsletter, 92-96 (1969). And, as this Court recently recognized, the application of the Indian Civil Rights Act to actions and prerogatives of Indian tribes is not within the province of federal courts. *Santa Clara Pueb' v. Martinez,* 436 U.S. 49 (1978).

[61]Apparently federal regulation is similarly distasteful to the Indian fishermen. Of the fishermen citied by federal officers for violating the court orders in 1978, one-third were Indians (Tr. November 3, 1978, pp. 14, 25)

threat to the state's conservation management of the salmon fishery that such a jurisdictional entity represents,[62] this Court should repudiate the concept of a "self-regulating" tribe.

These same principles require the reversal of the District Court's determination that, as applied to off-reservation treaty Indian fishing, the state's general conservation management regulations are prima facie invalid. Implicit in this Court's determination that the authority of the state to regulate the off-reservation fishery by treaty Indian derives from the state's sovereign power and obligation to conserve its fishery resources, *Ward v. Race Horse, supra,* is the concomitant recognition that the state in its sovereign capacity can define and implement its conservation program. As applied to treaty fishermen, state conservation objectives and implementing regulations must be "reasonable," *Puyallup III, supra,* at 175, and must "not discriminate against the Indians." *Puyallup I, supra,* at 398; cf., *Puyallup II, supra.* Subject to these substantive qualifications, however, the state's authority to regulate the fishing is sovereign, and cannot be conditioned upon the approval of a federal court or each of the Indian tribes and bands. The intelligent exercise of that authority requires that the state, with its resources, its management expertise, and its familiarity with the daily problems of salmon conservation in all of Washington's waters, be able to bind all citizens, both treaty Indians and other citizens, to its regulations to prevent overfishing of salmon stocks.

The necessity for a unified fisheries management system lies at the center of the United States-Canada convention creating the International Pacific Salmon Fisheries Commission. It also underpins the United States' recent assertion of exclusive jurisdiction of the anadromous fishery beyond the state's territorial waters in the Fisheries Management and Conservation Act of 1976, *supra,* 16 U.S.C. § 1812(a). That necessity is no less

[62] See discussion at pp. 108-109, *infra.*

compelling in the territorial waters of the state, and even in waters adjoining or passing through Indian reservations, as this Court recognized in *Puyallup III, supra.* As this court held in *Tulee v. Washington,* 315 U.S. 681 (1942), that,

> the treaty leaves the State with the power to impose on Indians *equally with others* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish. * * *

Id. at 684 (emphasis supplied; footnote omitted). More recently, in *Puyallup Tribe v. Department of Game (Puyallup III), supra,* the Court expressly rejected an assertion by the Puyallup Tribe that it was entitled to catch the entire harvestable portion of steelhead in the river and thereby force a complete closure of the sport fishery by other citizens in order to save the steelhead runs. *Id.* at 176-177. The ultimate resolution of the *Puyallup* epic recognizes that Indian and non-Indian fishermen, enjoying the salmon fishery "in common," must share the burden of conservation.

The preservation of an orderly fishery, a task which is indispensable to both the perpetuation of the salmon runs and the maximization of the salmon harvest available for all, requires that the state be enabled to apply reasonable conservation regulations uniformly, without distinction between treaty Indian and nontreaty fishermen. Otherwise, the state cannot avoid discriminating against either the Indian treaty right, or "the rights of the non-Indian citizens of Washington recognized in [these] (t)reat(ies)." *Puyallup III, supra,* at 176.

The burdens of conservation must be equitably pro-rated among all fishermen "to conserve an important natural resource." *Id.,* at 175.

Finally, in accordance with the principles set forth in the decisions of this Court which have interpreted the "in common with" portion of the fishing provisions of the treaties here at issue, the determination below that the state must exhaust all conservation regulatory alternatives

upon the activities of nontreaty fishermen before treaty Indian fishermen can be regulated must be reversed.

The nature of the Indian treaty right has never been regarded by this Court to be of such a character as to require that non-Indians bear a disproportionate share of the conservation burden in order that Indians might escape all the conservation restrictions on their fishing activities.

CONCLUSION

The District Court has by its original decision in this litigation attempted to revolutionize the historically established system of fishery management and the practice of an equal opportunity participation in the harvest of anadromous fish in Washington state. This new system simply has not worked. One may argue long, but fruitlessly, about who should be blamed for this result. That this *is* the result is beyond argument.

The court's system has created an administrative nightmare that has beset the state and International Pacific Salmon Fisheries Commission fisheries' managers, state and federal law enforcement officers, and the District Court itself. The number of docket entries in the District Court illustrates the dimensions of this nightmare. As of this writing, over 5,000 separate documents have been filed since the original decision, and they continue to proliferate almost daily.

The ultimate irony in this litigation is that its monstrous dimensions arise from a single paragraph in the Court's original opinion. See, 384 F. Supp., *supra* at 343 (Joint App. 88, 89). Within that paragraph is found the District Court's interpretation of the treaty provision granting or reserving to the Indians "the right of taking fish in common with the citizens of the Territory." The proper interpretation of this treaty provision is what we specially have focused upon, and we invite this Court to do likewise. If this Court reverses the District Court's

construction of the treaty, the Court's consideration of all other issues raised in this brief is obviated.

The District Court was not wrong in assuming that the Stevens treaties created a special fishing right for the Indians of Washington Territory. We have recognized in our brief that, in respect to fishing, treaty Indians do enjoy rights which the other citizens of Washington do not: An easement right over private property for securing access to fishing grounds, and a special protection against state conservation regulations which discriminate against their use of the fisheries resource within those grounds.

But these special rights do not include what the District Court has granted, a guaranteed allocation of 50% plus of the anadromous fish in Washington waters.

We ask this Court to give the "in common with" provision of the Stevens treaties the construction that its wording has always had prior to the District Court's decision, and thereby restore to all of the fishermen of Washington the basic right that the treaty makers intended to secure for them — equality of opportunity for each individual fishermen, Indian and non-Indian alike.

DATED this 6th day of December, 1978.

Respectfully submitted,

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